No. 97-1337

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In The

Supreme Court of the United States

October Term, 1997

STATE OF MINNESOTA, Minnesota Department of Natural Resources; RODNEY SANDO, Commissioner of Natural Resources; ARNE CARLSON, Governor of Minnesota; RAYMOND B. HITCHCOCK, Assistant Commissioner of Operations, Minnesota Department of Natural Resources,

Petitioners,

v.

MILLE LACS BAND OF CHIPPEWA INDIANS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX
VOLUME III, Pages 581 to 885

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

MILLE LACS BAND OF CHIPPEWA INDIANS, ARTHUR GAHBOW, WALTER SUTTON, CARLEEN BENJAMIN, and JOSEPH DUNKLEY,	)	
Plaintiffs,	)	
UNITED STATES OF AMERICA,	)	Civil No. 4-90-605
Plaintiff-Intervenor,	)	
vs.	)	
STATE OF MINNESOTA, MINNESOTA DEPARTMENT OF NATURAL RESOURCES, and ROD SANDO, COMMISSIONER OF NATURAL RESOURCES,	)	
Defendants,	)	
COUNTY OF AITKEN, *et al.*,	)	
Defendant-Intervenors,	)	
JOHN W. THOMPSON, *et al.*,	)	
Defendant-Intervenors,	)	
and SAVE LAKE MILLE LACS ASSOCIATION,	)	
Amicus Curiae.	)	

REPORT AND DIRECT TESTIMONY OF PROFESSOR CHARLES E. CLELAND FOR PLAINTIFFS

PRELIMINARY REPORT OF THE ETHNOHISTORICAL BASIS OF THE HUNTING, FISHING, AND GATHERING RIGHTS OF THE MILLE LACS CHIPPEWA

January 3, 1994

Prepared by:
/s/ Charles E. Cleland
Charles E. Cleland

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311 W. Grand River Ave.
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* * *

Introduction.

This report was prepared in the context of the dispute which has arisen between the Mille Lacs Chippewa and the State of Minnesota concerning the historical basis for Chippewa rights to make use of natural resources from the territory ceded by the Treaty of 1837. My opinion on the cultural and historical questions, which will be of concern to the court in resolving this dispute, was solicited by the Mille Lacs Chippewa. In order to answer a list of specific questions, which are included at the end of this introduction, I have conducted extensive documentary research over a four year period. Over three thousand documents pertaining to the history of the Mille Lacs Chippewa and spanning the period from 1800 until 1940, have been collected, catalogued, and abstracted. By in large, these were copied from the records of the Bureau

of Indian Affairs as they are reported in the National Archives in Washington, D.C., the territorial papers of the State of Minnesota and manuscript collections of the Minnesota Historical Society, and from a variety of other published and unpublished sources.

In collecting documentary records, I have had the aid of Dr. James McClurken of East Lansing, Michigan and Dr. Bruce White of Minneapolis. I have, however, personally done extensive research for this report in the National Archives, at the Minnesota Historical Society, and at the Wisconsin Historical Society. Documents used and cited in this research have also been obtained from the Office of the Attorney General of the State of Minnesota as part of the discovery process in the present litigation.

Documents collected in the various archives have been copied, catalogued and, in some cases, transcribed by employees of *Aurora Associates* under my direct personal supervision.

Interpreting this documentary record requires that it be considered in the historical context in which it was produced as well as the different cultural context in which it might be understood. To the understanding of such context I bring over thirty years of experience working with the ethnography, prehistory and ethnohistory of native peoples of the Great Lakes region. After earning a Ph.D. in Anthropology at the University of Michigan in 1966, I began my career at Michigan State University where I am a Professor of Anthropology and Curator of Great Lakes Archaeology and Ethnology. I have authored numerous scholarly articles on the historical and cultural

experience of Native Americans of the Great Lakes region, particularly the Ojibwa people. My book *Rites of Conquest* published in 1992 is a comprehensive account of the historical experience of Michigan's native people in the context of Great Lakes history and U.S. government Indian policy. As a professor at Michigan State University, I teach undergraduate and graduate courses on North American Ethnology, Native Peoples of the Great Lakes, History and Anthropology, Cultural Ecology, Ethnohistory, and North American Archaeology. I am also the senior research associate for *Aurora Associates*, an ethnohistorical consulting firm in Williamston, Michigan. I am a co-owner with my wife of *Aurora Associates* which is registered in the county of Ingham. (See vita, attached as exhibit 1).

Over the years I have been called upon by various tribes to enter my opinions in regard to historical and cultural facts surrounding the interpretation of nineteenth century treaties. The judicial disputes in which these questions arose were the Michigan fishing rights case, *US v Michigan*, the off-reservation hunting-fishing case in Wisconsin, *Lac Courte Oreilles v. Wisconsin* (Voigt), and the reservation boundary disputes, *Keweenaw Bay Indian Community v. Michigan*, and *US v. Michigan* (Saginaw Chippewa).

In rendering opinions in these matters as well as in other research undertaken for purely academic ends, difficult problems emerge which are inherent in using the documentary record to reconstruct intent of persons and meaning of past events. First, the documentary record is usually agonizingly incomplete; those details which may be important to the questions raised today may not have

occurred to those recording events 150 or more years ago. If they did, the details may be incomplete. It is necessary to recognize that most of the participants in the events of the nineteenth century northwest frontier could not read or write the English language; indeed many spoke only Ojibwa, French or, often, both.

Secondly, the historical record is also biased. Like the written and oral statements of modern people, those who created the written documents of prior times were influenced by opinions and attitudes which they held as a result of their age, gender, ethnic identity, religion, political persuasion, occupation, life experiences, and many other factors which affected what they observed and how they recorded it. In regard to records about Indians, it should be noted that since they themselves were people of an oral, rather than written tradition, essentially all the written records recording their history were made by outside observers. Moreover, those who created the vast bulk of the documentary record concerning Indians were not disinterested observers but missionaries, Indian agents, Indian traders or government officials involved in Indian affairs. In many cases, records left by these observers reflect their own interest and purpose on the American frontier. Thus, for example, missionaries often touted the progress of their few converts while totally ignoring the vast majority who spurned Christianity in favor of traditional religious views. Likewise, Indian agents, for obvious reasons were more inclined to discuss those Indians who adopted American housing and dress, who gave up the chase in favor of plow agriculture, and who saw the benefits of education over those who preferred traditional ways. The fact that the documentary

record is biased is not an indictment of the personal honesty of the observer; it is simply a fact which must be considered in reading the documentary record.

Yet a third and more difficult problem in interpreting the past exists where the documentary record spans two distinct cultures. This is the case where the events recorded about the history of one culture likely had a substantially different meaning in the context of the culture of the people who were not recording the events in written form. This is particularly true in cases when communication is impeded by a linguistic barrier. Treaties are a good example. These agreements were almost always arranged by the United States which framed the issues and provided for the negotiating context. The government hired the interpreters and scribes, conducted business through experienced negotiators, and was able to pressure Indian participants through the influence of agents, traders and missionaries. Indian views of negotiations as recorded in treaty journals as well as their ultimate understanding of what they agreed to in the treaty itself depended upon the difficult often impossible task of explaining complex concepts which probably had little cultural reality for Indian participants. Likewise, the non Indian participants had little real understanding of the concepts, symbols, and metaphors used by Indians in trying to make their views known to the government.

Finally, the interpretation of the historical record involves the biases of the modern historian. Swayed by personal experience, cultural bias, and favored theoretical positions, they are free to emphasize some documents and to downplay others, to favor one contemporary view

over another and finally to weave their own scenario of historic truth.

Given this rather dismal summary of the problems of approaching the reality of the historic past as it may be made known to us through historic documents, it is worth asking if it is at all possible to achieve this end. The answer is a qualified yes. Because of the inherent limitations of the historical record as well as the complexity of events, and our limited ability to comprehend how they are inter-related, historical truth will always be difficult to assertain. Yet contemplation of historical facts in the context of historical method and theory provide a means to approximate historic truth. Likewise modern political, judicial, literary and academic institutions provide their own formal context by which the veracity of historical reconstruction may be judged.

Although a full discussion of the historiographic process by which historians identify and deal with bias in the documentary record is not appropriate here, it suffices that one must avoid a literal reading of a document in favor of a more comprehensive understanding of the conditions under which the record was produced. This includes information about the personal life and interest of the observer as well as the contemporary beliefs and values which influenced the written observation. Government Indian agents, as an example, all had their own backgrounds and attitudes about Indians as well as certain specific objectives set forth as a matter of government Indian policy. To understand their writings one needs to seek as complete an understanding as possible of all these factors.

The problems of dealing with cultural bias in historical reconstruction has in fact produced a new field of academic inquiry called ethnohistory. This field requires knowledge drawn from both anthropological and historical method and theory. In effect, ethnohistory tries to interpret the documentary record in its proper cultural as well as historical context. A good example can be drawn from the work of Mary Black Rodgers whose attention was taken by the frequent complaints of starvation among the Ojibwa and Cree Indians of the Canadian boreal forest of Ontario during the eighteenth and early nineteenth centuries.[1] Through her work Rodgers was able to show that these complaints frequently made to traders and government agents had very little to do with want of food. Such statements as "Father we are poor and starving – give us food" or "Game is scarce and we cannot support ourselves. We will surely perish from hunger" were really supplications. Given the metaphors through which the Ojibwa interpreted their reality, these statements appealed for the parent-child symbiosis. Exchange of useful gifts, generosity, fictive kinship, political loyalty, and economic partnership were for the Ojibwa and Cree all summed up by in the statement "Help us, we are starving." If one was unaware of this quite separate reality one would be hard pressed to explain how the Ojibwa survived the hundreds of years of "disappearing game" and "starvation" described in historical texts. For our purpose, the important point is

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[1] Rodgers, Mary Black 1986 Varieties of "Starving": Semantics and Survival in the Subarctic Fur Trade, 1750-1850 Ethnohistory, Vol. 33, No. 4, pp. 353-383.

that ethnohistory, though necessarily imperfect in the attempt to account for cultural bias, does make us sensitive to the issue and attempts to deal with it by including the perspective of the "cultural other."

Turning now to the biases which arise from the weight and emphasis given by the historian, we find that these are limited only by the credence they find among the consumers of history. Of course, historical reconstruction may be arranged on a continuum from historical fiction "based on fact" through the most detailed and carefully balanced accounts of historical scholars. On the academic end of this continuum veracity is judged by the critical review of knowledgeable peers. Central to peer judgments are such factors as the thoroughness of the research, critical judgment concerning the importance of documents, the balanced use of conflicting or contrasting historical statements and how well the final account fits within the context of the times and culture in which the events occurred.

The use of nineteenth century documents and historical reports in judicial context has its own set of unique problems and perspectives. Returning again to treaties, the courts recognize these as both legal *and* historical documents. On the one hand they may be read strictly as a legal document, an ancient contract between an Indian tribe and the government of the United States. The interpretation of treaty language, however, requires historical context – background facts to provide the reality. Here what the treaty says may not be exactly what one or more

of the parties understood the agreement to mean. Historians, linguists, anthropologists and other academic specialists can, in these instances, provide helpful insight to the court.

For the purpose of the historical investigation at hand I have been asked by Mr. Marc Slonim, attorney for the Mille Lacs Band of Chippewa Indians to address a number of specific historical questions. I was instructed to provide as full and detailed account as possible given the documentary record available. The specific questions are as follows:

1. Was the Mille Lacs band party to the 1825 Treaty of Prairie du Chien and the 1837 Treaty with the Chippewa Nation signed at St. Peters?

2. Describe the Mille Lacs band's use of the territory described in the 1837 Treaty.

3. How did the Mille Lacs Chiefs who signed the 1837 Treaty understand its provisions?

4. How did the Chiefs understand Article 5 of the 1837 Treaty in respect to the following considerations:

   a. What resources could be harvested?

   b. Could these resources be harvested for commercial as well as subsistence purposes?

   c. Could they be harvested for other purposes, i.e. ceremonial, medicinal?

   d. What means could be used to harvest these resources?

   e. What seasons could these resources be harvested?

   f. Could non-Indians dictate season, method, or use of harvest?

   g. Could non-Indians impose fees on Indians as a condition of harvest?

   h. How long would these harvest rights last?

   i. How would the arrival of non-Indians (timber harvesters, settlers, etc) affect these rights?

   j. How would conflict with the Dakota affect these rights?

   k. Did the Mille Lacs band expect the President to protect these rights?

5. By provision of the 1837 Treaty did the Mille Lacs band agree to remove from the territory ceded?

6. What were the interactions between the Mille Lacs Chippewa and non-Indians between 1837 and 1850?

7. How were the Mille Lacs Chippewa perceived by non-Indians during the 1837-1850 period?

8. What was the interaction between the Mille Lacs and the Sioux between 1837 and 1850 and how did these interactions affect non-Indians?

9. Was the Mille Lacs band notified of the 1850 Removal Order?

10. Was the Removal Order of 1850 consistent with the way the Mille Lacs understood the treaty of 1837?

11. What steps were taken to apply the 1850 Removal Order to the Mille Lacs band?

12. What was the ultimate fate of the Removal Order?

13. Did the Mille Lacs band knowingly relinquish its rights under Article 5 of the 1837 Treaty when it signed the Treaty of Washington in 1855?

14. Could the Mille Lacs people have survived if they had been confined to the reservation created for them in the 1855 Treaty?

15. Did the Mille Lacs Chippewa continue to hunt, fish, and gather off their reservation after 1855?

16. Does the Mille Lacs band continue to occupy lands within the territory ceded in 1837 today?

The answers to these questions appear as the final chapter of the report which may be found on page 175.

Chapter 1

An Overview of Chippewa Use of Natural Resources in Historic Perspective

From prehistoric times until well into the twentieth century, the Indians of the Great Lakes-Upper Mississippi Valley region were dependent for their survival upon the use of natural resources. After contact with Euro-Americans in the seventeenth century, the Chippewa gradually

acquired non-traditional technology and employed new tools and weapons to the more efficient use of the same resources.[2] For example, guns came to replace the bow in hunting, steel traps replaced snares and commercially-made gilling twine was substituted for net material made of bark cordage. In fact, however, the plant and animal products taken from nature not only continued to sustain the Chippewa but also became the means to acquire this new technology from Euro-Americans.

At least a thousand years of adaptation to the mixed boreal-deciduous forests of the Great Lakes region helped produce the Chippewa culture which was superbly adjusted to the natural world. The Chippewa used essentially all of the plant and animal species of their environment. Besides food, these species supplied them with clothing, shelter, medicines, building materials, all of their tools and implements, canoes, decorative items and paints and dyes. Such materials came from the flesh, skin, horn, bone, quills, feathers, shell, stems, fibers, blossoms, seeds, roots, and bark. Thus, the Ojibwa knew and depended upon the complete inventory of species for their welfare and security. Ethnographic work in the twentieth century has documented that knowledge of and

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[2] Cleland, Charles E. 1992 *Rites of Conquest – The Culture and History of Michigan's Native Americans*. Ann Abor:University of Michigan Press.

Danzinger, Edmund 1979 *The Chippewas of Lake Superior*. Norman:University of Oklahoma Press.

Mason, Carol 1988 *Introduction to Wisconsin Indians:Prehistory to Statehood*. Salem WI:Sheffield Publ. Co.

Warren, William 1984 *History of the Ojibwa People* St. Paul:Minnesota Historical Society Press.

use of these resources formed a vast interlocking network in which each species played some role in supporting the lifeway of the Ojibwa.[3]

There are several fundamental principles which governed the relationship between the Chippewa and their natural environment. These include a vast knowledge of the natural history of plants and animals, efficient means of capture, and the social and political means to partitioning and distributing resources.

This last component was built around the patrilineal family which, in its simplest form, was composed of a man, his wife and children.[4] All tasks necessary for survival were distributed according to gender and age within this social unit, so that the family was in effect the

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[3] Cleland, Charles E. 1985 *A Research Report on the Nineteenth Century Patterns of Resource Use and Economic Strategy of the Lake Superior Chippewa*

Report Lac Courte Oreilles v. Wisconsin.

Densmore, Frances 1928 *Use of Plants by the Chippewa Indians* in U.S. Bureau of American Ethnology. 44th Annual Report 1926-27. Washington, D.C.: U.S. Government Printing Office.

Densmore, Frances 1929 *Chippewa Customs*. Bulletin 86. Bureau of American Ethnology. Washington D.C.: U.S. Government Printing Office.

Jenks, Albert E. 1900 *Wild Rice Gatherers of the Upper Lakes: A Study in American Primitive Economics*. U.S. Bureau of American Ethnology. 19th annual Report, 1897-98. Washington, D.C.: U.S. Government Printing Office.

[4] Sahlins, Marshall 1968 *Tribesmen*. Englewood Cliffs:Prentice-Hall. Service, Elman 1971 *Primitive Social Organization*. New York:Random House.

minimal economic unit of Chippewa society. Accordingly, men were hunters, women and children gatherers, and each in turn was responsible for the supply and manufacture of useful items and keepers of fundamental knowledge.

Each family was related to others through the practice of exogamous marriage by which daughters of one family married sons of neighboring families thus forming a network of cooperating in-laws. Cooperating families occupied a specifically defined but fluid territory which contained a sufficient quantity and diversity of resources to sustain the people therein. This territorially based cooperative group of intermarried families formed the band, which was in turn the largest economic and political unit of Chippewa society. Chippewa bands varied in size from 50 to 250 people, and on average were composed of about 25 families.[5]

Band territories, like bands themselves, were fluid in nature often shifting in size and configuration with growth or fission within the band. Thus, the boundaries of band territories were in a sense sociological rather than political. This was consistent with the Chippewa concept of property which did not exclude other Chippewa from the use of the resources of a band's territory. Permission was, however, required to use the resources upon which resident band members depended. Thus, in Chippewa concept, neither the band territory nor the resources they

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[5] Cleland, Charles E. 1992 From Ethnohistory to Archaeology: Ottawa and Ojibwa Band Territories of the Northern Great Lakes in *Text-Aided Archaeology*, B. J. Little (ed), Boca Raton:CRC Press.

contained were "owned" by the band, they were merely under the temporary stewardship of that group and its constituent families.[6]

The Chippewa followed a pattern of seasonal movement within their band territories. Indeed this scheduled use of resources was the heart of the hunting and gathering economy. Families had to move from one resource to the next as these became available in season. Such factors as the ripening of blueberries, spawning of certain fish species and the movement of migratory birds occasioned the movement of the Chippewa and their own patterns of aggregation or dispersion over the landscape. Thus, the Chippewa subsistence regime must be understood not in terms of a few important resources in and of themselves but the vital interlocking use of all resources.[7]

The families of the Mille Lacs and other Chippewa bands came together in largest numbers during the summer period when food was readily available. The families formed villages of up to several hundred people, usually

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[6] Sahlins, Marshall 1972 *Stoneage Economics*. Chicago:Aldine Publishing.

[7] Cleland, Charles 1985 A Research Report on the 19th Century Patterns of Resource Use and Economic Strategy of the Lake Superior Chippewa. Manuscript on file, the Michigan State University Museum.

Cleland, Charles 1993 Economic and Adaptive Change Among the Lake Superior Chippewa of the Nineteenth Century, in *Approaches to Culture Contact: Ethnohistorical and Archaeological Perspectives on Change*. J.D. Rodgers and S.M. Wilson (ed) New York:Plenum Press.

located on the shores of lakes. During this time the people fished and hunted near the village, collected wild plants and also planted small gardens of corn, beans and squash. Late summer was the time of greatest abundance and among the Chippewa of Wisconsin and Minnesota, the time of wild rice harvest. Rice and garden production were both extremely important to the Chippewa because these were the only foods which could be produced in quantity and effectively stored for future use. Unfortunately, both were unreliable; gardens because of short growing seasons, and rice because of water level fluctuation.[8]

After summer and fall harvests, the Chippewa turned to late fall fishing which was particularly important along the shores of the Great Lakes and some of the large inland lakes like Mille Lacs. The harvest of fall spawning species of trout and whitefish with gill nets produced a reliable and abundant food resource which could be frozen for winter use. Severe weather during the spawning season made this a dangerous and occasionally unreliable pursuit.[9]

After the fall fishery, the villages broke up as each family departed for hunting territories. Among the Minnesota Chippewa, the prime winter hunting grounds were along the woodland-prairie margins where white-

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[8] Jenks, Albert 1900 The Wild Rice Gatherers of the Upper Lakes. *Nineteenth Annual Report of the Bureau of American Ethnology*. Washington:Government Printing Office.

[9] Cleland, Charles E. 1982 The Inland Shore Fishery of the Northern Great Lakes: Its Development and Importance on Prehistory. *American Antiquity* 47(4):761-784.

tailed deer and elk were found in great numbers. The usual pattern for Wisconsin and Minnesota was for families to rapidly move south to these areas and then to spend the winter months gradually hunting their way north toward the sites of the summer villages. During the months of late winter, game was often in scarce supply and in poor condition and, as a result, the Chippewa relied upon stored food, particularly wild rice.[10]

In late spring, the appearance of spring spawning fish, especially sturgeon and suckers, made it possible for families to congregate in small groups where these resources were available. As plants began to emerge and animals to be more readily available, the summer villages were reconstituted.

Between 1907 and 1925 the ethnologist Frances Densmore, working through the Smithsonian Institution, visited the Minnesota and Wisconsin Chippewa in order to study traditional Chippewa culture. At Mille Lacs she was able to collect a detailed description of the economic cycle or subsistence round from a seventy four year old woman named *Nodinens*. This account should therefore date to the late 1850's or early 1860's. Because of its rich detail and insight into the way the Mille Lacs lived at that period it is quoted here in full:

> When I was young everything was very systematic. We worked day and night and made

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[10] Cleland, Charles E. 1992 Economic and Adaptive Change Among the Lake Superior Chippewa of the Nineteenth Century in *Approaches to Cultural Contact: Ethnohistorical and Archaeological Perspectives on Change* ed by J. Rodgers and S. Wilson. New York:

the best use of the material we had. My father kept count of the days on a stick. He had a stick long enough to last a year and he always began a new stick in the fall. He cut a big notch for the first day of a new moon and a small notch for each of the other days. I will begin my story at the time when he began a new counting stick. After my mother had put away the wild rice, maple sugar, and other food that we would need during the winter she made some new mats for the sides of the wigwam. These were made of bulrushes which she had gathered and dried. She selected a nice smooth piece of ground and spread them out.

I, as the oldest daughter, boiled basswood bark, and made cord, and grandmother made the bone needles that we would use in weaving the mats. When the rushes were ready, we laid a cord on the ground and measured the right length for the mats. My mother knew just how long they should be to go around the wigwam, and we made five long ones, four of middle size, and two small ones. The long ones were two double-arms' lengths, and the middle-sized ones were about one and a half double-arms' lengths. We laid the rushes two layers deep on the ground with the ends resting on the cord, and then fastened the ends of the rushes to the cord, after which we fastened the cord to the pole that was the upper, horizontal part of the weaving frame. My grandmother directed everything, and she had a large quantity of the thorns from the thorn-apple tree in a leather bag. She had been gathering these all summer, but she made sure she had plenty. We all three worked hard getting ready for winter. When my mother had finished the bulrush mats she made more mats for the floor, using either fresh reeds

or some that she had gathered during the summer, and she made more of the woven-yarn bags in which we kept our belongings.

My home was at Mille Lac, and when the ice froze on the lake we started for the game field. I carried half of the bulrush mats and my mother carried the other half. We rolled the blankets inside the mats; and if there was a little baby, my mother put in inside the roll, cradle board and all. It was a warm place and safe for the baby. I carried a kettle beside my roll of mats. We took only food that was light in weight, such as rice and dried berries, and we always took a bag of dried pumpkin flowers, as they were so nice to thicken the meat gravy during the winter. There were six families in our party, and when we found a nice place in the deep woods we made our winter camp. The men shoveled away the snow in a big space, and the six wigwams were put in a circle and banked with evergreen boughs and snow. Of course, the snow was all shoveled away in the inside of the wigwam, and plenty of cedar boughs were spread on the ground and covered with blankets for our beds, the bright yarn bags being set along the wall for use as pillows. In the center was a place for a fire, and between it and the floor mats there was a strip of hard, dry ground that was kept clean by sweeping it with a broom made of cedar boughs. The wigwam looked nice with the yellow birchbark top and the bright-colored things inside. Outside the door there was a little shed made of cedar bark in which we kept the split wood for the fire, so it would not get wet and so we could get it easily in the night. Sometimes there were many of these sheds around the door or a wigwam. The men

brought the logs and the women chopped the wood, and put it in the sheds ready for use.

There was a big fire in the middle of the camp, and all the families did their cooking around this fire if the weather was not too cold, but we always had a fire in the wigwam in the evening, so it would be warm for us to sleep. We always slept barefoot, with our feet toward the fire, and we loosened our other clothing. I wore a dress of coarse broadcloth, with separate pieces of the cloth to cover my arms, and I had broadcloth leggings that came to my knees, but I wore no other clothing except my moccasins and blanket. The big rack for drying meat was over the fire burning low and evenly to dry the meat. When the men came home at night the rack was taken off the fire, for the men put in lots of light wood to dry their clothing. They sat around it, smoking and talking. If a snowstorm came on we spread sheets of birch bark over the meat. We did not dry it entirely – only enough so that it would keep – and the drying was finished in the sun when we reached our summer camp. The fire blazed brightly until bedtime, and then the men put on dry wood so it would smolder all night. The women were busy during the day preparing the meat, attending to their household tasks, and keeping the clothing of the men in order. Each man had two or three leather suits which required considerable mending, as they had such hard wear. We snared rabbits and partridges for food and cleaned and froze all that we did not need at the time.

My father was a good hunter and sometimes killed two deer in a day. Some hunters took a sled to bring back the game, but more

frequently they brought back only part of the animal, and the women went next day and packed the rest of the meat on their backs. It was the custom for a man to give a feast with the first deer or other game that he killed. The deer was cut up, boiled, and seasoned nicely, and all the other families were invited to the feast. Each family gave such a feast when the man killed his first game. The men were good hunters, and we had plenty of meat, but every bit of the deer that was not eaten was dried for carrying away, the extra meat, the liver and heart, and even the hoofs. I remember that once a hunter heard an owl following him. When he returned to camp he said "You must preserve every bit of deer. This is a bad sign, and we will not get any more game for a long time." The hunters went out every day, but could find nothing. We stayed there until we had eaten almost all that we intended to carry away. We were so hungry that we had to dig roots and boil them. My father was a *Mide*, and one day, when the provisions were almost gone, a young man entered our wigwam with a kettle or rice, some dried berries, and some tobacco. He placed this before my father, saying: "Our friend, we are in danger of starving; help us." This man was the *ockabewis* who managed and directed things in the camp, and his arms were painted with vermilion.

My father called his *Mide* friends together and they sang almost all night. The men sang *Mide* songs and shook their rattles. No woman was allowed to go in that direction. The children were put to bed early and told that they must not even look up. My mother sat up and kept the fire burning. My father came in late and

sang a *Mide* song, and a voice was heard outside the wigwam joining in the song. It was a woman's voice, and my mother heard it plainly. This was considered a good omen. The next morning my father directed that a fire be made at some distance from the camp. The *ockabewis* made the fire, and the *Mide* went there and sang. They put sweet grass and medicine on the fire, and let the smoke cover their bodies, their clothing, and their guns. When this was finished, my father covered his hand with red paint and applied it to the shoulders of the men. They took their guns and started to hunt, feeling sure they would succeed. No woman was allowed to pass in front of the hunters when they were starting. The *ockabewis* killed a bear that day and every man got some game. They killed plenty of deer and bear and each person boiled the breast of the animals in a separate kettle from the rest of the meat. There was a feast, and they brought these kettles to my father's lodge, and the old men ate there, sitting by themselves and eating from these kettles. After that whenever we were short of game they brought a kettle of rice to my father and he sang and the luck would return. He was so successful that we had plenty of food all that winter.

The hides were tanned with the hair on and were spread on the cedar boughs along the edge of the wigwam. Father gathered us children around him in the evening and instructed us as we sat on these soft hides. He instructed us to be kind to the poor and aged and to help those who were helpless. This made a deep impression on me, and I have always helped the old people, going into the woods and getting sticks

and scraping their kinnikinnick for them. During the winter my grandmother made lots of fish nets of nettle stalk fiber. Everyone was busy. Some of the men started on long hunting trips in the middle of the winter, and did not get back until after the spring work was done; then they rested a while and started off on their fall hunting and trapping.

Toward the last of the winter my father would say, "one month after another month has gone by. Spring is near and we must get back to our other work." So the women wrapped the dried meat tightly in tanned deerskins and the men packed their furs on sleds or toboggans. Once there was a fearful snowstorm when we were starting to go back and my father quickly made snowshoes from the branches for all the older people. Grandmother had a supply of thorn-apple thorns and she got these out and pinned up the children's coats so they would be warm and we started off in the snowstorm and went to the sugar bush.

When we got to the sugar bush we took the birch-bark dishes out of the storage and the women began tapping the trees. We had queer-shaped axes made of iron. Our sugar camp was always near Mille Lac, and the men cut holes in the ice, put something over their heads, and fished through the ice. There were plenty of big fish in those days, and the men speared them. My father had some wire, and he made fish-hooks and tied them on basswood cord, and he got lots of pickerel that way. A food cache was always near the sugar camp. We opened that and had all kinds of nice food that we had stored in the fail. There were cedar-bark bags of

rice and there were cranberries sewed in birch-bark *makuks* and long strings of dried potatoes and apples. Grandmother had charge of all this, and made the young girls do the work. As soon as the little creeks opened, the boys caught lots of small fish, and my sister and I carried them to the camp and dried them on a frame. My mother had two or three big brass kettles that she had bought from an English trader and a few tin pails from the American trader. She used these in making the sugar.

We had plenty of birch-bark dishes, but the children ate mostly from the large shells that we got along the lake shore. We had sauce from the dried cranberries and blueberries sweetened with the new maple sugar. The women gathered the inside bark of the cedar. This can only be gotten in the spring, and we got plenty of it for making mats and bags.

Toward the end of the sugar season there was a great deal of thick syrup called the "last run of sap," and we had lots of fish that we had dried. This provided us with food during the time we were making our gardens.

The six families went together, and the distance was not long. Each family had a large bark house with a platform along each side, like the lodge in which the maple sap was boiled. We renewed the bark if necessary, and this was our summer home. The camps extended along the lake shore, and each family had its own garden. We added to our garden every year, my father and brothers breaking the ground with old axes, bones, or anything that would cut and break up the ground. My father had wooden hoes that he made, and sometimes we used the shoulder

blade of a large deer or a moose, holding it in the hand. We planted potatoes, corn, and pumpkins. These were the principal crops. After the garden was planted the *Mide* gathered together, made a feast, and asked the *Mide manido* to bless the garden. They had a kind of ceremony and sang *Mide* songs. Old women could attend this feast, but no young people were allowed. Children were afraid when their parents told them to keep away from such a place. The gardens were never watered. A scarecrow made of straw was always put in a garden.

In the spring we had pigeons to eat. They came in flocks and the men put up long fish nets on poles, just the same as in the water, and caught the pigeons in that way. We boiled them with potatoes and with meat. We went to get wild potatoes in the spring and a little later the blueberries, gooseberries, and June berries were ripe along the lake shore. The previous fall the women had tied green rice in long bundles and at this time they took it out, parched and pounded it, and we had that for food. There was scarcely an idle person around the place. The women made cedar-bark mats and bags for summer use. By that time the reeds for making floor mats were ready for use. They grew in a certain place and the girls carried them to the camp. We gathered plenty of the basswood bark and birch bark, using our canoes along the lake and the streams. We dried berries and put them in bags for winter use. During the summer we frequently slept in the open.

Next came the rice season. The rice fields were quite a distance away and we went there and camped while we gathered rice. Then we

returned to our summer camp and harvested our potatoes, corn, pumpkins, and squash, putting them in caches which were not far from the gardens.

By this time the men had gone away for the fall trapping. When the harvest was over and colder weather came, the women began their fall fishing, often working at this until after the snow came. When the men returned from the fall trapping we started for the winter camp.[11]

Nodinens's account of the Mille Lacs's economy during her childhood certainly provides a picture of wide spectrum resource use but this account specifically mentions only a tiny fraction of all the resources the Mille Lacs actually utilized in the 1850's.

During the late seventeenth, eighteenth, and early nineteenth centuries, the Chippewa came into increasing contact with Euro-Americans who engaged them in the fur trade. In exchange for pelts of beaver, otter, marten, mink, and other fur bearers, native people acquired such items of western technology as iron knives, axes, and strike-a-lites, manufactured clothing, copper and brass kettles, firearms, iron traps and many other useful and decorative artifacts. These and other factors or contact like epidemic diseases, Christianity, warfare, and intermarriage with non-Indians caused substantial change in Chippewa culture. One thing which did not change, however, was the basic seasonal round and dependence on

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[11] Densmore, Frances 1970 *Chippewa Customs*. Minneapolis: Ross and Haines Inc. pp. 119-123.

natural resources to supply food, shelter, working materials, medicines and other items necessary for survival.

The Chippewa did learn the ways of mercantilism; they came to understand that things could be privately owned and assigned value, that owned and unowned things were valued relative to each other, that these values fluctuated and that there was competition among buyers and sellers. Thus, a beaver pelt became a sort of currency. It was "worth" a given amount in the sense that so many beaver pelts were necessary to "buy" a blanket. They also knew that one trader might offer more or less than the next for the same pelt.[12]

During the period of the fur trade and for some time after its decline in the late 1830's, the Chippewa maintained their own economic system quite apart from that required for interaction with the Euro-American traders. Their own set of "economic" assumptions stressed the reciprocal exchange of items among kin. Here, value was based on the social ramifications and context of exchange not the arbitrary value of the item. Exchange engendered goodwill by consolidating social bonds as gifts circulated in the community. If commodities such as food, manufactured items or even services became scarce, the Chippewa

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[12] Birk, D. 1989 *John Sayer's Snake River Journal, 1804-05.* Minneapolis:Institute for Minnesota Archaeology, Inc.

Thwaites, R.G. 1910 A Wisconsin Fur Traders Journal, 1804-05 by Francois Malhoit. *Collections of the State Historical Society of Wisconsin* 19:163-233.

Thwaites, R.G., 1911 A Wisconsin Fur Trader's Journal, 1803-04 by Michael Curot. *Collections of the State Historical Society of Wisconsin* 20:396-471.

did not hoard them but would more readily give them away. Most importantly, the whole motivation of Chippewa exchange profited the community not the individual. Prestige was the result of generosity.[13]

During the fur trade era the Chippewa were able to keep these two economic realms relatively separate though traders were often frustrated because Indians would not respond according to their own expectations. With the Chippewa there was no assumption of unlimited demand. For example, if the trader lowered the price of goods expecting Indians to hunt harder so they could take advantage of the bargain, Indians responded by hunting less because they could get the amount of trade goods they needed without as much work.[14] The same furs which could be sold to a trader in order to obtain a blanket and an ax might as easily be given to a brother-in-law to satisfy a social obligation which could otherwise have been discharged by the ax alone.

From the very beginning of their contact with Euro-Americans, the Chippewa became suppliers of goods and services vital to the survival of non-Indian newcomers to the Great Lakes forests.[15] The Chippewa and members of other tribes acted as suppliers of clothing, housing,

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[13] Sahlins, Marshal 1972 *Stoneage Economics.* Chicago:Aldine Publishing.

[14] Ray, Arthur J. 1974 *Indians in the Fur Trade: Their Role as Trappers, Hunters, and Middlemen in the Lands Southwest of Hudson Bay 1660-1870.* Toronto:University of Toronto Press.

[15] Cleland, Charles E. 1992 *Rites of Conquest – The Culture and History of Michigan's Native People.* Ann Arbor:University of Michigan Press.

canoes, and food for Euro-American travelers, traders, missionaries, and military garrisons. Thus deer, moose, whitefish, lake trout, passenger pigeon, turkey, geese and ducks, bark, pitch, cordage, skins as well as manufactured goods of these and many more natural resources became commodities with which the Indians sold or traded with their new neighbors. Indian-supplied natural resources were the means by which Indians prospered and non-Indians survived.

As the fur trade became less important after the 1830's, trade in wild rice, meat, fish and other natural resources became even more important to the Chippewa as these commodities took up the gap left by the collapse of the international fur market. Although trade in fur and skins continued to be an important part of the Indian economy in the Great Lakes-Upper Mississippi valley throughout the nineteenth and early twentieth century, it was never as dominant as it had been during the eighteenth century. By the 1830's the silk hat replaced the felt hat which was made primarily of beaver fur and the market price for raw fur fell very rapidly. Thereafter, fur was primarily used for coats, trim and lap robes.[16]

With the waning of the fur trade after 1836, the Chippewa began to intensively produce maple sugar in vast quantities for the American market. Likewise, market production of salt fish was important in the Lake

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[16] Gilman, Rhoda 1974 The Fur Trade in the Upper Mississippi Valley, 1630-1850. *Wisconsin Magazine of History* 58:3-18.

White, Bruce 1987 A Skilled Game of Exchange: Ojibwa Fur Trade Protocol. *Minnesota History* Summer, 222-240.

Superior region.[17] At about the same time, lumber men and miners began to enter the Chippewa territory ceded in 1837 and 1842. These men provided yet another new market for Chippewa-produced natural resources. Rice, sugar, venison, water fowl and fish were acquired and sold or traded at lumber camps where these foods were a welcome addition to a fare of preserved foods. One particularly important focus of the lumber man market was the St. Croix valley, Rum River, and Mille Lacs. Here, rich rice and fish resources and large communities of both Chippewa and lumber men promoted commerce in natural resources as well as competition over resource use.

As the *St. Anthony Express* reported in January of 1852, the diet of lumber men on the Rum River was composed of " . . . coarse healthy foods, bread, pork fish, beef salt and beans, butter, cheese, lard, apples and mince pies of the best quality. Also, plenty of good venison, fish, fowl, wild cranberries in abundance, all of which we get of the Indians in exchange for sait food etc. I must say that the Indians are very friendly and accommodating in various ways."[18]

Speaking of Mille Lacs specifically, a report on the "Minnesota Pineries" in the *St. Paul Minnesotan* in Feb. 1852 reported that: "In the three miles east of Mille Lacs, large and extensive beds of wild rice grow; a luxury that the lumber men purchase for a trifle from the Indians,

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[17] ABCFM Ms. Ba10.A512b. Box 2. Oct. 31, 1838. F. Ayer to E. Ely.

NAM M234 R 388:390-407. Jan 6, 1843. A. Brunson to J. Doty.

[18] *St. Anthony Express* Vol. 1, No. 36, Jan 31, 1852.

who gather thousands of bushels every year. Around Mille Lacs, maple sugar is made, which the Indians sell at five cents per pound. These advantages make Rum River the most desirable point for lumbering that has yet been discovered in Minnesota."[19]

As towns and farmsteads grew up in Chippewa country during the late nineteenth and early twentieth centuries, yet another market appeared, sale for household consumption. The Chippewa marketed blueberries, cranberries, wild rice, maple sugar, venison, and other game door-to-door. Other very important aspects of this trade were handicraft items such as baskets, mats, and a large variety of containers made from natural materials by traditional methods.[20] American pioneers for the most part appreciated and depended upon these Chippewa produced goods and services.

The post-lumbering era brought a huge increase in deer populations in the new second growth forest of the Great Lakes region. This, and the appearance of railroads connecting the region to distant urban centers, gave rise to a market hunting boom in the late decades of the nineteenth century. Over-harvest by non-Indians led to the imposition of state game and fish laws aimed initially at preventing abuse of wildlife populations. These same laws, however, worked incredible hardship on Chippewa hunters and their families. This development, combined with the attempt to confine Chippewa treaty hunting,

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[19] *St. Paul Minnesotan* Vol. 1, No. 21, Feb. 7, 1852.

[20] Shifferd, P. 1976 A Study in Economic Change: the Chippewa of Northern Wisconsin: 1854-1900. *The Western Canadian Journal of Anthropology* Vol. VI No. 4: pp. 16-41.

fishing and gathering to reservation areas, eventually undermined the mobility which was necessary to sustain traditional subsistence rounds. The result was widespread starvation, malnutrition, and other economic hardship in Chippewa communities. Although the Chippewa of the twentieth century continued to assert treaty rights to hunt, fish, and gather over ceded territories, these activities, of necessity, gradually became supplemental rather than primary means of support during the early decades of the twentieth century.[21]

Wage labor, much of it involving skills at the harvesting of natural resources in the lumbering and fishing industries as well as handicraft production, helped to take up the slack. When ethnologist Frances Densmore visited the Wisconsin and Minnesota Chippewa and the Mille Lacs in particular during the early decades of the twentieth century, they had extensive knowledge of the natural world. They knew the ancient techniques of using the game, fish and plant species in a measured and responsible way and they saw themselves as living harmoniously with the natural world which was and remains important to them as a people today.[22]

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[21] Shifferd, P. 1976 A study in Economic Change the Chippewa of Northern Wisconsin: 1854-1900. *The Western Canadian Journal of Anthropology* Vol. VI, No. 4:pp.16-41.

[22] Densmore, Frances 1929 Chippewa Customs. Bureau of American Ethnology, Bulletin No. 86. Washington D.C.:Government Printing Office.

Chapter 3

The 1837 Treaty of St. Peters

Pressure from citizens and Wisconsin politicians in the years before 1836 led to a Senate bill authorizing a treaty of cession with the Chippewa which would give United States citizens access to valuable pine timber of north central and western Wisconsin and that portion of the present state of Minnesota which lies east of the Mississippi River. Secretary of War, Lewis Cass stated this to be the main objective of the proposed treaty but also believed that the land could eventually be sold to American settlers for agricultural purposes. He believed, moreover, that the proposed purchase was "on the frontier" of the countries of both the Dakota and Chippewa and therefore "very unimportant to either". Cass hoped that the eventual establishment of American settlements along the Mississippi River would help separate the two warring tribes.[55] In the spring of 1837 General W. R. Smith and Wisconsin Territorial Governor Henry Dodge were appointed as treaty commissioners and Ver Planck Van Antwerp was appointed as treaty secretary.[56]

Commissioner of Indian Affairs Carey Harris issued instructions to the commissioners which reiterated that the main purpose of the treaty was to acquire land "valuable for its pine woods which cover it, but is unfit for

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[55] NAM M21 R. 18:76-77. March 7, 1836. L. Cass to VanBuren.

NAM M21 R. 21:200. May 13, 1837. C. Harris to H. Dodge and W.R. Smith.

[56] NAM T494 R. 3. March 25, 1837. J. Poinsett to H. Dodge.

cultivation." In exchange for the cession, the Indians were to be offered "money, provisions, agricultural and mechanical establishments, education and other means of improvement." These goods and services were "to be delivered at certain points in their own country at the expense of the United States." The commissioners were instructed to provide no reservations for individual Indians but could include an article covering trader debts and payment to half-breeds. Finally they were to impress the Chippewa with the "absolute necessity of refraining from aggression on the Sioux [Dakota] or on our citizens."[57]

One of the other tasks of the commissioners was to try to ascertain if the Chippewa of Wisconsin and Minnesota would accept immigration of the Ottawa and Chippewa from Michigan who had agreed to remove west in treaties concluded in 1836 and 1837. Apparently the western Chippewa refused, since by the fall of 1837 the United States closed out the option of the Michigan Chippewa to remove to the northwest.[58] The attempts to remove eastern Indians such as the Michigan Chippewa was part of a United States Indian policy during the 1830's and early 1840's which was based upon the Indian Removal Act of 1830.[59] This Act authorized the exchange of lands with Indians residing in any of the states or territories for land

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[57] NAM M21 R. 21:200. May 13, 1837. C. Harris to H. Dodge and W.R. Smith.

[58] NAM M21 R. 22:364-365. Oct. 2, 1837. C.A. Harris to H.R. Schoolcraft.

[59] 4 Stats. 411-12. Indian Removal Act of 1830.

west of the Mississippi River. Removal was to be completely permissive requiring the willing consent of the Indian tribe. The Act also included provisions which paid for abandoned improvements and furnished emigrating Indians with support in moving, and in establishing settlements at the location of their new home. Removal treaties contained specific provisions which met all of these specific requirements of the Removal Act. Although the Treaty to be negotiated at St. Peters was written at the height of the removal era, it is clearly not a removal treaty.

There was no discussion whatsoever during the negotiation of the treaty and nothing in the treaty itself which implies removal. Neither Secretary of War Cass, Commissioner of Indian Affairs Harris, nor treaty Commissioner Dodge ever suggested removing the Chippewa from the 1837 cession. That fact that during the negotiations the Chippewa were promised that annuities and services would be provided "in their own country" indicate that the Chippewa expected to remain and to coexist with non-Indians who would enter their territory as a result of the treaty.[60]

In late June of 1837 over one thousand Chippewa assembled at Ft. Snelling for the purpose of negotiating a

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[60] NM 006415 M951 R. 4:109. July 26, 1842. J. Doty to H. Crawford.

NAM T494 R. 3:548-568. July 20, 1837. Proceedings of the Council held by Gov. Henry Dodge with the Chiefs and Principal Men of the Chippewa Nation of Indians near Ft. Snelling at the Confluence of the St. Peters and Mississippi Rivers. Manuscript copy p. 25-26.

treaty with the United States. General Smith, however, did not appear, leaving the treaty business to Governor Henry Dodge and Commission Secretary Ver Planck Van Antwerp. Apparently, Dodge believed that since none of the Chippewa of the region had yet ceded land and since he was charged with encouraging peace between the Chippewa and the Dakota, that he should bring as many Chippewa bands together as possible.[61] Most of the Chippewa, who the United States later categorized as belonging to one of three large groups, that is, the Chippewa of the Mississippi, the Chippewa of Lake Superior, and the Pillager Chippewa, were represented. Specifically, these included at least bands from Leech Lake, Gull Lake and Swan River, Mille Lacs, Sandy Lake, Snake and St. Croix Rivers, Fond du Lac, La Pointe, Lac du Flambeau and Lac Courte Oreilles. As a result, many of the Indians attending the treaty convention did not live on the lands which the United States proposed-to buy.

Even though the United States had decided to temporarily delay asking the Chippewa on the south shore of Lake Superior and northern Minnesota to cede their land, Governor Dodge conducted the treaty with the "Chippewa Nation of Indians."[62] He thus created a political amalgam which had no reality for the Chippewa and plagued relations between both the Chippewa and the United States and separate Chippewa bands for years into the future. No doubt Dodge was well aware of the

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[61] NAM T494, R. 3:540-545. Aug. 7, 1837. H. Dodge to C. Harris.

[62] NAM M21 R. 18:76-77. Mar. 7, 1836. L. Cass to VanBuren.

separate interests of the Chippewa bands, but was creating a political entity with whom the United States could deal in the future for land on a piecemeal basis.[63]

The negotiation of the Treaty of St. Peters is recorded in a journal kept by treaty secretary Van Antwerp. As treaty journals go it is quite complete, reflecting opinions of Indian negotiators as well as those of Governor Dodge. The journal is written in English so that the statements of Indians are the product of translators. According to the journal, Steven Bonga and Patrick Quinn translated from English to Chippewa while Scott Campbell and Jean Baptiste Dubay translated from Chippewa to English. There is reason to believe that the difficult job of translating was at times less than competent. For example, Secretary Van Antwerp notes in the margin of his journal that a portion of a speech by *Maghegabo* was rendered as "nonsense" when translated literally and that the interpreters were "unfit to act in that capacity." The particular phrase noted was the statement "My father listen to me. Of all the country that we grant you, we wish to hold on to a tree where we get our living, and to reserve the streams where we drink the waters that give us life." Van Antwerp notes that this was a metaphorical reference to the desire of the Indians to reserve the privilege of hunting and fishing upon the lands and making sugar from the maple.[64] The missionary Alfred Brunson who attended

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[63] MN 007529 M951 R4:067. Oct. 18, 1839. H. Dodge to H. Crawford.

[64] NAM T494 R. 3:548-468. July 20, 1837. Proceedings of the council held by Gov. Henry Dodge with the Chiefs and Principal Men of the Chippewa Nation of the Indians near Ft. Snelling at the Confluence of the St. Peter and Mississippi Rivers. Manuscript copy p. 21.

the 1837 treaty as an observer remarked that " . . . there was also a Chippewa interpreter, Stephen Bonga who was also pious, and did the principle interpreting for that tribe; the government interpreter, a thick-mouthed, stammering Irishman not being able to speak intelligibly in either language."[65]

The journal begins by describing several days of preliminary discussion between Dodge and the delegation of Indians who were present on the treaty grounds on the 20th of July. Dodge was frustrated to find that the Chiefs were not willing to negotiate until the arrival of the chiefs who would represent the bands of interior Wisconsin. The Pillager chief *Aishkebugekoshe* (Flat Mouth) explained Chippewa politics and band sovereignty to Dodge:

> My Father, I shall say but little to you at this time. I am called a chief. I am not the chief of the whole nation, but only of my people or tribe. I speak to you now only because I see nobody else ready to do so. I do not wish to take any further steps about what you have proposed to us until the other people arrive who have been expected here. They have not yet come, and to do so before their arrival might be considered an improper interference, and unfair towards them. The residence of my band is outside of the country which you wish to buy from us. After the people who live in that country shall have

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[65] Brunson, Alfred 1879 *A Western Pioneer or Incidents of the Life and Times of Rev. Alfred Brunson*. Cincinnati:Hichcock and Walden, p. 83.

> told you their minds I will speak. If the lands you wish to buy were occupied by my band, I would immediately have given you my opinion. After listening to the people who we are expecting and who will speak to you, I will abide by what they say, and say more to you myself.[66]

The interior chiefs finally arrived on July 25 permitting full discussion of the business at hand. The Mille Lacs chief *Washaskkokone* (Muskrat's Liver) made it plain that the lands were occupied by the Mille Lacs band. As he told Dodge, "We are talking about the land you have come for. I have tread all over it with my war club in my hand. My ancestors and those of *Pagoonakeezhig* (Hole in the Day) were the chiefs and protectors of that country and drove the bad Indians (Sioux) away from it."[67] (Map 3).

In explaining his purpose to the Chiefs, Governor Dodge stressed again and again that the Great Father wanted the pine timber from the land. After describing the land and showing the chiefs a map of the proposed cession "which the Great Father wishes to purchase for his white children." Dodge told the chiefs that, "This country as I am informed is not valuable to you for its

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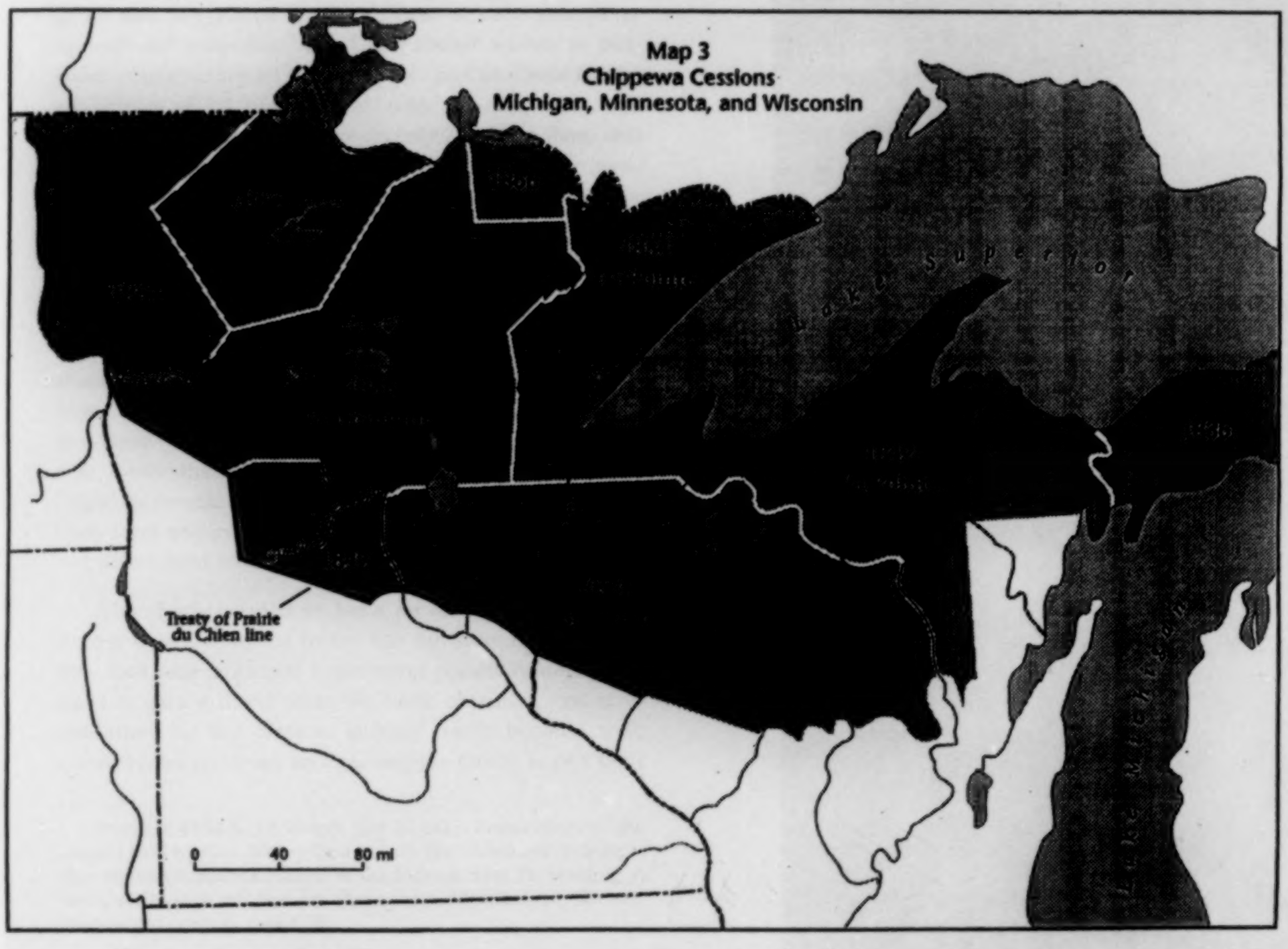
[66] NAM T494 R. 3:548-468. July 20, 1837. Proceedings of the council held by Gov. Henry Dodge with the Chiefs and Principle Men of the Chippewa Nation of the Indians near Ft. Snelling at the Confluence of the St. Peter and Mississippi Rivers. Manuscript copy p. 5.

[67] NAM T494 R. 3:548-468. July 20, 1837. Proceedings of the council held by Gov. Henry Dodge with the Chiefs and Principle Men of the Chippewa Nation of the radians near Ft. Snelling at the Confluence of the St. Peter and Mississippi Rivers. Manuscript copy p. 13.



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game and not suited to the culture of corn and other agricultural purposes. Your Great Father wishes to purchase your country on the Chippewa and St. Croix for the advantage of its pine timber with which it abounds. Dodge repeated this objective on July 26 telling them that the land was barren of game and worthless for agricultural purposes but that "it abounded in pine timber which the Great Father, the President of the United States wished to buy from them for the use of his white children and that he would give them a fair price for it."[68] In other words Dodge was saying that the region would not be required for agricultural settlement but was being purchased so the pine trees could be cut. In fact, the Chippewa had agreed to a similar offer by the United States at the Treaty of Fond du Lac in 1826 when in Article 3 of that treaty the Chippewa granted the government the "right to search for, and carry away, any metals or minerals from any part of their country." This 1826 grant did not affect land title or jurisdiction.[69]

The chiefs seemed to have no real objection to the central objective of the treaty, but the journal shows that they had four principal negotiating points: retaining the right to gain a living from the land, obtaining just compensation for the cession, sharing treaty benefits with mixed-blood relatives, and gaining the means to pay their

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[68] NAM T494 R. 3:548-468. July 20 1837. Proceedings of the council held by Gov. Henry Dodge with the Chiefs and Principle Men of the Chippewa Nation of the Indians near Ft. Snelling at the Confluence of the St. Peter and Mississippi Rivers. Manuscript copy p. 2 and 18.

[69] Treaty of Fond du Lac 1826.

debts to traders. The traders who were in fact often mixed-blood relatives as well, were in a position to put immense pressure on the Indians in favor of these concessions. As the Snake River chief *Shagobi* (Little Six) himself a mixed blood put it, "But they are afraid to return home, if their traders are not paid. They fear they should not survive the winter without their aid."[70] While the Chippewa were often angry about their treatment by the traders and complained about inflated prices for goods and the fact that the traders used wood, fish, and game without compensation, the Indians were unable to resist their influence.[71]

The treaty journal provides details of the discussion of the terms of the cession. The Chippewa first proposed that the agreement be limited to a term of sixty years after which time negotiations would be reopened. This seemed reasonable in view of the fact that many of the Chippewa believed they were only selling pine trees on the stump – not land. As Flatmouth argued "It is hard to give up the lands. They will remain and cannot be destroyed but you may cut down the trees and others will grow up."[72]

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[70] NAM T494 R. 3:548-568. July 20, 1837. Proceedings of a council . . . p. 31.

[71] American Board of Commission of Foreign Missions. Oct. 4, 1837. F. Ayer to D. Green. Minnesota Historic Society MSS 141:No. 192.

NAM M234 R. 387:100-105. Sept. 30, 1837. F. Ayer to M. Van Buren. Speeches of *Nodin et al.*

[72] NAM T494 R. 3:548-568. July 20, 1837. Proceedings of a council . . . p. 25.

Governor Dodge, however, insisted that the cession be on the same basis by which the United States obtained cessions from other Indian tribes, that is, in perpetuity. The chiefs then proposed that payments ought also to be made in perpetuity – as "long as the land lasts." Dodge also resisted this suggestion and insisted on a twenty year annuity schedule. In order to arrive at a monetary offer Dodge suggested that the chiefs consult with their agents Bushnell and Vineyard. According to the terms of the treaty, money, goods, blacksmith shops, farmers, seed, tools, provisions, and other treaty benefits were to be paid, provided and established at times and places fixed by the President and the Commissioner of Indian Affairs.

Of great importance to the chiefs was to win a clear statement of their perpetual right to hunt, fish, and gather in the ceded territory. They explained repeatedly that this right was necessary for their survival and to obtain the support of the traders upon whom they depended for guns, powder shot, iron tools and tailored clothing.[73]

Maghegabo in metaphorical expression insisted that the Chippewa retain the right to hunt, fish, and gather. As he put it, "of all the country that we grant you, we wish to hold onto a tree where we get our living and to reserve the streams where we drink the waters that give us life."[74] Flat Mouth stated the same position more directly:

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[73] NAM T494 R. 3:548-568. July 20, 1837. Proceedings of a council . . . p. 29.

[74] NAM T494 R. 3:548-568. July 20, 1837. Proceedings of a council . . . p. 21.

> My father, your children are willing to let you have their lands, but they wish to reserve the privilege of making sugar from the trees and getting a living from the lakes and rivers, as they have done heretofore and of remaining in the country. It is hard to give up the lands. They will remain, and cannot be destroyed – but you may cut down the trees and others will grow up. You know we cannot live deprived of our lakes and rivers. There is some game on the lands yet, and for that reason also, we wish to remain upon them, to get a living. Sometimes we scrape the trees and eat the bark. The Great Spirit above, made the Earth and causes it to produce, which enables us to live.[75]

In another speech Flat Mouth restated this view again, "You know that without the land, and the rivers and lakes we could not live. We hunt and make sugar, and dig roots upon the former, while we fish and obtain rice and drink from the latter."[76]

Governor Dodge of course knew that this was true and offered no resistance to the Chippewa insistence on hunting, fishing, and gathering rights. He replied to Flat Mouth as follows: "My Friends I have listened with great attention, to your chief from Leech Lake. I will make known to your Great Father, your request to be permitted to make sugar, on the lands, and you will be allowed, during his pleasure, to hunt and fish on them. It will

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[75] NAM T494 R. 3:548-568. July 20, 1837. Proceedings of a council . . . p. 25-26.

[76] NAM T494 R. 3:548-568. July 20, 1837. Proceedings of a council . . . p. 29.

probably be many years, before your Great Father will want all these lands for the use of his white children."[77]

Article 5 of the Treaty of St. Peters "guaranteed" the Chippewa "the privilege of hunting, fishing, and gathering the wild rice upon the lands the rivers, and lakes included in the territory ceded" . . . "during the pleasure of the President of the United States."[78] Since in Chippewa life each individual, man, woman, and child, made their own decisions, the power of decision making and the authority which goes with it were not assigned to others. Even the most prominent Chippewa chiefs were powerless to make decisions for others. For this reason they relied on consensus not authority in their political life.[79] Given this cultural reality it is difficult to believe that the Chippewa would have understood that the President could simply and capriciously foreclose on their reserved usufruct. One contemporary individual who knew the Chippewa and understood this point was missionary William Boutwell. Soon after the treaty he wrote to his superior David Greene that he had high regard for Governor Dodge – "but the Indians have no idea of leaving their country while they live – they know nothing of the duration of a man's pleasure."[80]

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[77] NAM T494 R. 3:548-568. July 20, 1837. Proceedings of a council . . . p. 27.

[78] 7 Stat. 536 Treaty of St. Peters.

[79] Sahlins, Marshall 1968 *Tribesmen*. Englewood Cliffs, N.J.:Prentice-Hall.

[80] ABCFM Ms. BA10.A512b. Aug. 17, 1837. W. Boutwell to D. Greene.

To the Chippewa, Article 5 meant that they would use all of the resources which were necessary for their support. The reference to "making sugar" "gathering wild rice" and "reserving the oak tree" from the journal and the treaty itself are categorical references, not strict limitations on what might be harvested. The Chippewa also understood that to some degree they would be sharing the resources of the land with non-Indians who would come as the result of the treaty. Given the size of the territory, the purpose of the treaty, and the abundance of resources, the Chippewa did not believe that the newcomers would interfere with their hunting, fishing and gathering activities. *Maghegabo* expressed this idea when he told Governor Dodge:

> If I have rightly understood you, we can remain on the lands and hunt here. We have heretofore got our living on them. We hope that your people will not act towards ours, as your forefathers did towards our own [war of 1812?] but that you will always treat us kindly as you do now.[81]

The Chippewa did not understand the phase "during the pleasure of the President" to mean that they would have to remove from the ceded territory. Had this eventually been raised at St. Peters there would certainly have been a huge outcry from the Chippewa as there was when this possibility was discussed in the 1842 negotiations of the La Pointe treaty. At that time the Chippewa were greatly threatened by the suggestion and repeatedly

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[81] NAM T494 R.3: 548-568. July 20, 1837. Proceedings of a council . . . p. 23.

sought assurances from the government that they would not be removed – at least not for a very long time (see Chapter 4). The journal of the St. Peters Treaty, the official correspondence of the treaty commissioners, the statements of the Chippewa and, most important, the treaty itself are silent on removal.

The negotiation of the St. Peters Treaty was attended by language and symbolism intended to create an atmosphere which would lend importance, solemnity, and great weight to the agreement. This was true on both the American and Indian sides. Clearly playing to the Indian concept of diplomatic agreements being a matter of personal honor among chiefs, Dodge cast the discussion of the President of the United States in terms of the father's relationship to his children, both Indian and non-Indian. This relationship was to be guided by wisdom and justice for the welfare of these children and most of all in trust. Thus, Dodge explained that in obtaining the land for the benefit of his white children, the Great Father wanted to pay a fair price for the cession – "to give full value, payable in such a manner, as will be most serviceable to your people" and that "equal justice should be done to all." In another context, Governor Dodge informed the Chippewa that " . . . I tell you this now, that you may not hereafter say I deceived you. Your Great Father has sent me to treat you as his children, to pay you the value of your land and not to deceive you in anything I may do with you, or say to you."[82] Elsewhere Dodge told the

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[82] NAM T494 R. 3:548-568. July 20, 1837. Proceedings of a council . . . p. 24.

assembled Chippewa that "their Great Father, the President of the United States, would be just toward them."[83] Thus, the Chippewa were invited to rely, and did rely, on the Great Father to protect their rights.

For the Indians, the treaty was a very important agreement attended by appropriate ritual. *Nodin*, one of the principle Chippewa speakers explained to an impatient Governor Dodge that the business of the treaty would take a long time. "My Father, I attended a council at Prairie du Chien (Treaty of Prairie du Chien 1825) which lasted ten days. Some of those now here were then present. This will last longer, as it is one of greater importance."[84] The council opened with "the usual ceremony" which no doubt included a grand entrance, songs, prayers by the shamen, and a pipe ceremony. After this, each band representative rose to introduce himself and to state his authority as a chief. In Chippewa fashion, most of the formal negotiation was conducted by a peace chief, in this case *Aishkebogekozho* or Flat Mouth who spoke for the civil chiefs and a war chief *Maghegabo* who spoke for the braves and warriors. Secretary Van Antwerp tells us that *Maghegabo* at the occasion of his first formal appearance in council "came forward in true Indian costume to wit; naked except as to his leggings, breech cloth and flap; his full head of hair ranging loosely upon his shoulders; a sort of crown upon his head made for the occasion and filled with feathers of the Bald Eagle, placed there by

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[83] NAM T494 R. 3:548-568. July 20, 1837. Proceedings of a council . . . p. 19.

[84] NAM T494 R. 3:548-568. July 20, 1837. Proceedings of a council . . . p. 7.

the chiefs; and the medals of several of the chiefs hung around his neck. He advanced to the Governor's table with his war flag and planted it there."[85]

In typical Chippewa fashion, *Maghegabo* offered supplication to the Great Father on behalf of al the Chippewa making it clear he was not speaking personally but was voicing consensus in a formal way, "I have but few words to say, but they are those of the chiefs and are very important. What I am now going to say to you, is a kind of history of our chiefs. The Being that created us, made us naked, but created you and your people with knowledge and power to get a living. Not so with us; we had to cover ourselves with moss and rotten wood; and you must be merciful to us."[86]

At the conclusion of the treaty the Chippewa chiefs gave their assent by a ceremony called "touching the quill". This entailed each one literally touching the pen with which the treaty secretary would make a mark after the name of each. Some individuals would not touch the quill while in the hand of the secretary but required it to be on the table. This ceremony was likely related to the mysterious power the Chippewa assigned to the written word, believing that what was written must be true. When the Treaty of St. Peters was finally signed, Governor Dodge had three copies made: one for the Chippewa, one of the Great Father, and one for himself. Dodge apologized to the Chippewa for not having U.S. Bags and

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[85] NAM T494 R. 3:548-568. July 20, 1837. Proceedings of a council . . . p. 20-21.

[86] NAM T494 R. 3:548-568. July 20, 1837. Proceedings of a council . . . p. 21.

Presidential medals to pass out to the chiefs but promised to deliver them the next year at the first treaty payment. Dodge also cautioned the Chippewa not to strike the Dakota who were camped around Ft. Snelling saying that any blow would also fall upon himself and the Great Father. Thus, the Treaty of St. Peters adjourned with a promise and a warning.

In recommending ratification, Governor Dodge noted that the treaty would help keep the peace which was being threatened by 200 lumber men who were already operating illegally in "Indian country". He went on to state that these trespassers should be removed.[87] Again, in mid-summer just after the treaty was ratified, Dodge wrote to Harris with several suggestions so that "the treaty made with them may be carried into effect with good faith by the government."[88] He repeated these ideas in October when he bought to Commissioner Harris' attention that there were now 500 lumber men in the cession. He told Harris that "I deem it a matter of the first importance that the Indians who have heretofore occupied and claimed that country should be satisfied as far as they can be made so to [produce] a friendly understanding between them and the people who are in the occupation of the Pine region building mills, preparing rafts of timber to descent the river and many are making improvements to remain in that country during the next

[87] NAM M234 R. 948:251. May 18, 1838. H. Dodge to C. Harris.

[88] NAM M234 R. 948:226. July 6, 1838. H. Dodge to C. Harris.

winter. I will do anything in my power to carry into effect the provisions of the treaty."[89]

In February of 1839 subagent Bushnell wrote to Dodge saying that he was well acquainted with the Chippewa and that the general policy of removing Indians west of the Mississippi River could not be applied to "this portion of the Chippewas" because it would not only bring them into closer contact with the Dakota but would "require them to change their habits entirely."[90]

Not only was there no talk of removal in the few years after the treaty of 1837 but the federal government, through *ex officio* superintendent of Indian Affairs for the Wisconsin territory Henry Dodge, seemed dedicated to fairness and to providing services as promised. Dodge believed that such behavior on the part of the United States would promote tranquil relations between the Chippewa and the American citizens occupying the cession.

As in the case of many treaties, the one at St. Peters was followed by a period of confusion, while Indians, their agents, traders, missionaries, and citizens waited to evaluate its practical impact. Other than to permit the influx of lumber men along the southern fringes of the cession, it had very little initial effect on the lives of the Chippewa. The payment of annuities in the late summer or fall often interfered with the timing of critical rice or fish harvest. When divided per capita, payments were so

[89] NAM M234 R. 948. Oct. 1, 1838. H. Dodge to C. Harris.

[90] NAM M234 R. 948. Feb. 13, 1839. D. Bushnell to H. Dodge.

small many often did not bother to collect them. The Chippewa continued to hunt and fish for a living and to slip into debt to their traders.[91] Smallpox also struck the Chippewa in the several years following the treaty with devastating effect.

After an initial report on the condition of the Lake Superior and Mississippi Chippewa by missionary Sherman Hall in 1833, a mission was established at La Pointe under the auspices of the American Board of the Commission of Foreign Missions in Boston.[92] During the 1830's, mission stations were established at various times at Fond du Lac, Bad River, Sandy Lake, Leech Lake, Yellow Lake, and Pokegoma on the Snake River. Missionary efforts encountered great resistance on the part of the Chippewa, who certainly did not meet the high expectations of the missionaries. It is true, however, that the missionaries became important intermediaries between the Chippewa and the United States government as well as an important source of information about what was happening on the Lake Superior-Mississippi valley frontier.[93]

During the early 1840's, the Chippewa experienced growing frustration over the 1837 treaty and became

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[91] ARCOIA 1837. C. Harris to J. Poinsett.
MN 007620. Feb. 15, 1838. *Hole in the Day* to Major Pympton.
ABCFM Ms.BA10.A512b. Oct. 8, 1838. F. Ayer to D. Greene.
ARCOIA 1838.

[92] ABCFM Ms. BA10.A512B. May 1833. S. Hall to W.T. Boutwell. Minnesota Historical Society, MMS No. 74, 75, and 76.

[93] ABCFM Ms. BA10.512b. Oct. 8 1838. F. Ayer to D. Green. Minnesota Historical Society, MMS No. 141:194.

increasingly distrustful of motives of the United States. One of the main points of contention was who should be paid treaty annuities. Commissioner of Indian Affairs Crawford insisted that those Indians who signed the treaty could receive annuities irrespective of whether or not they actually claimed an interest in the land ceded.[94] Governor Dodge, however, argued that annuities should be paid only to those who immediately occupied the land were entitled to annuities. He said it was deemed proper at the time of the treaty that all of the bands should become parties "leaving it to the tribe afterward to determine their rights under it".[95]

Chapter 4

The 1842 Treaty of La Pointe

Treaty Setting.

Just as access to timber motivated the Treaty of St. Peters in 1837, so did the strong desire to mine the newly discovered mineral wealth of northern Michigan create pressure for a treaty of cession with the Chippewa of the Lake Superior shore (Map 3). The new superintendent of the Mackinac Agency and former chief factor of the American Fur Company, Robert Stuart, wrote to Secretary of War, John Spencer urging that the impending treaty include the balance of the south shore of Lake Superior,

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[94] MN 007497. July 25, 1839. T.H. Crawford to L. Lyons.

[95] MN 007529. M951 R. 4:067. Oct. 18, 1839. H. Dodge to T.H.Crawford.

that is, from the 1836 cession in Michigan to the mouth of the St. Louis River.[96]

In early August, Stuart was appointed as U.S. Commissioner for the treaty and received instructions from Commissioner of Indian Affairs Crawford.[97] He was to treat for cession of seven million acres for an amount not to exceed 30,000 dollars plus beneficial services and the payment of Indian debts to traders. Commissioner Crawford suggested that a stipulation be added which would require the Chippewa to remove from the cession. In order to accomplish this, Stuart was told to include the Chippewa of the Mississippi in the annuity payments for the cession. This would make the unceded land west of Lake Superior "common property" rather than belonging only to those bands who actually lived there.[98] He went on to say that while it was likely that the Chippewa who occupied the ceded territory would not have to remove for a considerable time, the period was uncertain and that they should have the obligation to go when ordered by the President.

Stuart called all of the bands of Chippewa residing on Lake Superior, in the interior of Wisconsin and as far west as the Mississippi River together at La Pointe in late September. Between three and four thousand Indians representing twenty three distinct bands arrived at the appointed time.

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[96] Docket 18C. Plantiff [sic] exhibit 72, July 27, 1842. R. Stuart to J.C. Spenser.

[97] NAM M1 R. 53, Aug. 1, 1842. H. Crawford to R. Stuart.

[98] NAM M1 R. 53, Aug. 1, 1842. H. Crawford to R. Stuart.

Although no official minutes were kept for the 1842 treaty, an unofficial account was made by Henry Blatchford, the interpreter for the mission at La Pointe who was also an official interpreter at the treaty.[99] In addition, Robert Stuart later reconstructed and recorded several of his speeches at the treaty council which seem to agree in substantial detail with the record made by Blatchford.[100]

Blatchford records that as the bands arrived in fleets of canoes they were dressed and painted in their finest regalia. Each brigade was greeted by gun fire from anchored ships which was answered in return by a fusillade from the Indian canoes. The entrance of Hole in the Day (the elder) and the Gull Lake Chippewa was particularly impressive as they had built a platform on a bateau upon which warriors danced accompanied by war songs sung by Indian musicians.

When the bateau landed "they proceeded to the council ground in truly martial order. The leader at their head bearing the American colors, succeeded by the warriors and these followed by the musicians consisting of drummers and singers and rattlers, that is, men with rattles. These all proceeded in a slow military dance, peculiar to the Indians but difficult to describe."[101]

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[99] ABCFM Ms. BA10.A512b. May 3, 1843. L.H. Wheeler to D. Greene. Journal of the 1842 Treaty negotiated at La Pointe.

[100] NAM M234, R. 389:61-67. Sept. 29, 1842. Speech at La Pointe by Robert Stuart. Enclosed with NAM M234 R. 389. Mar. 29, 1844.

[101] ABCFM BA10.A512b. May 3, 1843. L.H. Wheeler to D. Greene. Journal of the 1842 Treaty Negotiated at La Pointe.

Stuart opened the council by telling the Chippewa that he had personally talked to the Great Father about them and that the President knew they were poor. Stuart said that the Great Father would therefore purchase the land for their benefit. He pointed out that some of the Chippewa already received treaty benefits while others did not.[102] In this Stuart was not only trying to induce the Lake Superior bands to sell, but to deal with hard feelings over annuity payments under the 1837 Treaty. There was confusion over who should rightfully receive annuities under the 1837 treaty, those who signed or only those who occupied the ceded land. Jealousies had already arisen over these benefits since some of the Chippewa, most notably the Pillagers, were excluded. Further, some chiefs were upset because the U.S. insisted on making payments under the 1837 Treaty at La Pointe during the late summer or fall. The chiefs complained that this required long, difficult travel which interfered with vital fall hunts and ricing. Following the 1842 Treaty, Stuart recommended that annuities and services be paid at La Pointe, L'Anse, and Pokegama and elsewhere in the ceded territory.[103]

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[102] NAM M234, R. 389:61-67. Sept. 29, 1842. Speech at La Pointe by Robert Stuart. Enclosed with NAM M234 R. 389. Mar. 29, 1844.

ABCFM BA10.A512b. May 3, 1843. L.H. Wheeler to D. Greene. Journal of the 1842 Treaty negotiated at La Pointe.

[103] ARCOIA 1842.

NAM M234 R. 425:146-154. Oct. 28, 1842. R. Stuart to H. Crawford.

Stuart specified the land that the United States wanted to buy but also said that the land north of the Fond du Lac River [St. Louis River] to the British line "shall be reserved as a home in common for you all."[104] He declared that annuities would be paid on a per capita basis and would be combined with those due under the St. Peters Treaty [1837] "to all Mississippi and Lake Superior Chippewa, as far up to the Sandy Lake band." This, he said, "would prevent future jealousies and allay the bad feelings which now exist among you and make you like a band of Brothers."[105]

Although the collective terms "Chippewa of the Mississippi" and "Chippewa of Lake Superior" were similar to those used by the Chippewa to refer to broad distinctions of geographical and economic residence, and although the terms were used in a similar way by American officials, they did not have political meaning for either the Chippewa or the United States until the Treaty of 1842. By concluding a treaty with the "Chippewa of the Mississippi *and* Lake Superior", Stuart not only created two large political groups that actually did not exist among the Chippewa but combined these to form a single treaty entity.[106]

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[104] NAM M234,R. 389:61-67. Sept. 29, 1842. Speech at La Pointe by Robert Stuart. Enclosed with NAM M234 R. 389. Mar. 29, 1844.

[105] NAM M234, R. 389:61-67. Sept. 29, 1842. Speech at La Pointe by Robert Stuart. Enclosed with NAM M234 R. 389. Mar. 29, 1844.

[106] Treaty of La Pointe. U.S. Statutes at Large 7:591.

Blatchford's journal provides an interesting insight into the solemnity with which the Chippewa regarded the signing of a treaty. A ceremony which is rendered into English as "touching the pen" apparently arose among the Chippewa to seal treaty agreements. It would seem that the ceremony involved a way for them to symbolically participate in the mystery of the written word.

> The Chiefs came forward to sign the Treaty and also some of the Principle men. A list of the names having been previously made out, a person in signing the Treaty would touch the pen of the commissioner's secretary and the latter would then [sic] make a cross opposite the Indian's name. This the Indians called touching the pen, some to make the treaty more binding would not touch the pen in the secretaries hands. But they must touch it in the father's [Stuart] hands himself.[107]

The Removal Provision and Stuart's Assurances.

The Blatchford treaty account shows that the Chippewa were very concerned when Stuart raised the prospect of removal. They were much opposed to this idea and Stuart was only able to get them to agree to sign the treaty by reassuring them of their security. Stuart told the Chippewa that "the great benefit your Father expects to derive from these lands is from the minerals that are on them. Until the lands are wanted you will be permitted to

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[107] ABCFM Ms BA10.512b. May 3, 1843. L.H. Wheeler to D. Greene. Journal of the 1842 Treaty negotiated at La Pointe.

live on them as you do now."[108] After describing the cession Stuart told the chiefs "you understand these boundaries now don't you? You are to have the privilege of living on your lands to hunt and fish, till your great Father requires you to remove, you understand he does not want the land now, it is only the minerals he wants. It will be better for you to have the same laws over you than to have the laws of the States. The laws of the United States are to remain over you as at present. I am very glad that some of your chiefs are so wise as to ask and desire it to be so."[109]

Article 2 of the 1842 Treaty of La Pointe in similar language to the 1837 Treaty at St. Peters stipulated for "the right of hunting on the ceded territory with the other privileges of occupancy."[110] Unlike the Treaty of 1837, however this treaty states that the use right would continue until the Chippewa were required to remove by the President. As in the case of the 1837 treaty the Treaty of 1842 was not a removal treaty in any formal sense. At the time it was negotiated the Chippewa understood and indeed Commissioner Stuart understood that it would be many years and perhaps generations before the United States might require the Chippewa to remove north of the St. Louis River.[111] In fact, Dodge's emphasis on pine

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[108] ABCFM BA10.A512b. May 3, 1843. L.H. Wheeler to D. Greene. Journal of the 1842 Treaty negotiated at La Pointe.
MCT DKT 18C Ex. 72. July 27, 1842. Robert Stuart to J. Spencer.

[109] ABCFM Ms BA10.A512b. May 3, 1843. L.H. Wheeler to D. Green [sic] Journal of the 1842 Treaty negotiated at La Pointe.

[110] Treaty of La Pointe. U.S. Statutes at Large 7:591.

[111] NAM M1 R. 53, Aug 1, 1842. H Crawford to R. Stuart.

timber and lack of good agricultural land in the 1837 cession like Stuart's repeated emphasis on the interest of the United States in the minerals and the frequent contention on the part of the U.S. officials that the ceded land was worthless for agriculture, led some Chippewa to believe that they had in fact only sold the pine timber and minerals.

Unlike the 1837 treaty, the Chippewa negotiating in 1842, clearly understood that there was a possibility of future removal on the part of the United States. Even so, it was made plain to the Chippewa that any such removal, if it were to occur, would be well into the future. This assurance they demanded and received from Robert Stuart. At the point when the chiefs were filing up to "touch the pen" Chief White Crow balked, saying he was afraid that if he signed he would be called upon to immediately remove. He asked Stuart at this point for a reservation. Stuart responded that he could not provide a reservation but reassured White Crow that "the land would probably not [sic] be wanted during his lifetime."[112]

In January of 1843 Agent Brunson at La Pointe wrote to Secretary of War Spencer complaining that the 1842 treaty cheated the Chippewa. It was his contention that they did not receive as much per acre as other tribes especially considering the commercial worth of furs, sugar, rice, fish and game which he calculated to be worth 190 thousand dollars per year. Brunson also

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[112] ABCFM BA.10.A512b. May 3, 1843. L. Wheeler to D. Greene. Journal of 1842 Treaty.

attached letters stating the opinions of several Chippewa chiefs including Marten, listed as head chief at Lac Courte Oreilles. Martin stated that he was not at St. Peters [1837 Treaty] so he did not sell his land until last fall [1842 Treaty]. When he signed the treaty Marten *(Wabijeshi)* said he made a condition " . . . that we should remain on the land, as long as we are peaceable. We have no objections to the white man's working the mines, and the timber and making farms, but we reserve the Birch bark and cedar for canoes, the Rice and the Sugar tree and the privilege of hunting without being disturbed by the whites."[113] Stuart, himself, confirmed this understanding when he reported to the Commissioner of Indian Affairs Crawford in 1843 that "early removal was not in conformity with the spirit of the treaty."[114]

In later years when the government did actually attempt to remove the Chippewa, there was a new round of claims by the chiefs of their understanding of the removal discussion as well as responses from various officials. Chief Buffalo, also a signer the 1842 treaty repeated this belief in 1851 when he addressed an anti-removal petition to the Commissioner of Indian Affairs. Buffalo said that Stuart had told him "Your Great Father, he said, does not want the land to cultivate but only the minerals on it which he wants. The whites do not wish to

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[113] NAM M234 R. 388:390-407. January 8, 1843. A. Brunson to H. Doty. Enclosure by Marten.

[114] ABCFM Ba10.A512b. Dec. 8, 1842. R. Stuart to D. Greene.

Senate Document 403(29-1)477 June 24, 1846. Message from the President-Letter by R. Stuart.

come and occupy your country now – until they want it you will be permitted to live and hunt on your lands as before. So far as you may live on land which will be needed by the miners, you will have to remove to one side; but if you are not in the way of the whites, and live on terms of friendship with them, it will be a great while before you will be required to remove. I don't believe you or I will ever see the day when you will be troubled about your lands." Stuart, Buffalo reported, promised that "we and our children after us might be permitted to live on our lands fifty years and even a hundred if we lived on friendly terms with the whites."[115]

Subagent John Livermore wrote to Governor Ramsey in March of 1850 that he tried to soften the blow of their impending removal by an early warning. This tactic seems not to have worked since Livermore reported that they were "considerably excited" by the news. The chiefs from Bad River told Livermore that "the man who came here to make the treaty [Stuart] told them that they would not probably be required to remove for many years and not until their annuities would have ceased, and probably that they could spend their lives here. This, I am told by those who were present, is true.[116]

Respected citizen, Cyrus Mendenhall, wrote to the Commissioner of Indian Affairs on January 6, 1851 stating that he was a witness to the 1842 treaty. He said that Stuart told the Indians that they would be able to occupy

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[115] LCO Voight Ex. 1. Nov. 6, 1851. Chief Buffalo et al to L. Lea.

[116] NAM M234 R. 390 M784. Mar. 26, 1850. J. Livermore to A. Ramsey.

the land as long as they behaved well and that Stuart illustrated his point with an analogy. He told the Chippewa, according to Mendenhall, that "the purchase he wished to make was like buying a pack of furs from one of them, paying for it, then handing it back for the Indian's own use."[117]

Many non-Indians concurred in this general opinion as well as the impression given by Stuart that he was interested in acquiring the mineral wealth of the cession and not the land.[118] Even removal agent John Watrous seems to concede that Stuart led the Chippewa to believe they would not be required to remove.[119]

At the La Pointe payment in the fall of 1853, the Chippewa chiefs now wary of all government intentions and actions, discussed their understanding of the removal provision of the 1842 treaty with agent Gilbert who passed on his observations to Commissioner Manypenny.

> The Indians informed me that when the treaty was made, the Commissioner assured them that the clause providing for their removal was only inserted as a mere matter of form. That a compliance with it would never be urged or

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[117] Doyle, James Hon. 1978 Opinion and Order, *United States v Bouchard*, 464 Federal Supplement 1316 (1978) p. 1327.

[118] MN 06427. June 30, 1850. A Chippewa Address by Chief Hole in the Day. MN 003366. Jan 21, 1851. S. Treat to L. Lea.
NAM M234 R. 767:131-141. Jan. 28, 1851. W. Warren to A. Ramsey (enclosure).
ABCFM BA10.A512b. Box 5. Aug. 27, 1851. S. Hall to S. Treat.

[119] MN 007661. Mar. 18, 1852. J. Watrous to A. Ramsey.

insisted on by the government and that their annuities would always be paid at La Pointe. The interpreter Mr. Johnson who officiated in that occasion was present with me and collaborated this statement. I saw several other persons who were present at that time and they all concur in saying that without this assurance the Indians would never have signed the treaty. The memory of an Indian is very tenacious. He treasures up everything that is said by a government official and regards his statements and verbal assurances as equally binding upon the government as the formal stipulations of a treaty.[120]

In 1864 the Chippewa chiefs at L'Anse met and recorded in Chippewa their own understanding of what transpired at the 1842 treaty. The chiefs agreed that Stuart had asked to buy the minerals, not land and that they understood that they could remain on the land for a very long time. Recounting the incident between White Crow and Stuart the chiefs concluded:

> /Midach minawa, gi ajidemigud, gi idud/ dach; Anich botch win igo geiabi Nani/-midana dasso bibon gi gadabbetan man/dan Aki, bochke bigo Ningodwak dasso-/-bibon gi gad abitan mandan ki dakin,/Eji dibendaman nongom ebitaman.
>
> /Anich gonima dach win ningoding ki ga-/ gi sagassweigowa aw Gimichomissiwa tchi/ gagwedjimineg mandan ki dakimiwa/nongom ebitameg.

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120 NAM M234 R. 404:183-190. Dec. 10, 1853. H. Gilbert to G. Manypenny.

A translation is presented by the Ojibwa linguist John Nichols as follows:

> Then he [White Crow] was answered back, and told that he any how had the privilege of remaining on the land for fifty years, and even for a hundred years as he owned and had possession of the land, he has a right to live on it.
>
> But then there may be a time that your Great Father will call you to council and ask you to sell him the land you live on.[121]

This same view was expressed by the Bad River Chief Blackbird in 1869 when he contended that the treaty makers sold only the minerals and timber in the treaties of 1842 and 1837.[122]

Hunting-Fishing-Gathering in the 1837 and 1842 Treaties.

In the context of all of the treaties which the United States wrote with Native American tribes, the treaty of La Pointe in 1842 and the St. Peters Treaty of 1837 are very unusual. These may be the only treaties where the major purpose was to acquire specific natural resources. As is made clear by the instructions for both treaties and by the speeches of the respective treaty commissioners, acquiring the land was almost incidental – a necessity to control access to pine timber and minerals. The second unusual feature is that neither treaty makes provisions for the

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121 Nichols, John 1988 *Statement Made by the Indians: A bilingual Petition of the Chippewas of Lake Superior, 1864*. London: Univ. of Western Ontario.

122 NAM M234 R. 156:613. Sept. 12, 1869. Speech by Blackbird in Council at Bad River.

permanent settlement of the Indians who occupied the cessions. In almost every other treaty of cession a specific homeland was set aside either in a remote place or within the territory ceded. In the case of these two treaties, the assumption was that the Indians would remain as before, scattered throughout the ceded territory. Here they were to receive annuities and other services and benefits. That the 1842 treaty made provision for payment of annuities on the ceded territory, that the trade and intercourse laws were extended over all of the territory ceded, and that the carpenters provided by the treaty were to circulate among the Indian communities to build houses, confirm this fact.[123] This same conclusion can be reached in regard to the 1837 cession because annuities and services were also provided on territory ceded in that treaty.[124] By 1842 the United States government had no short nor long term plan to remove Indians from either the 1837 or 1842 cessions beyond the vague recognition that the United States might in the far, indefinite future need the land for other purposes. Since neither cession was correctly considered to contain prime agricultural land, American officials at the time had no idea as to why, when, or if ever, the land might be required. This is also made abundantly clear by what Dodge and Stuart told the Indians and by what they themselves wrote after the treaties were concluded. It is for this reason that no removal language appears in the 1837 treaty and why in the case of the 1842

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[123] ABCFM Ms. BA10512b. May 3, 1843. L.H. Wheeler to D. Greene. Journal of the 1842 Treaty negotiated at La Pointe. MSS 141, No. 223, p. 12.

[124] ABCFM BA10.A512b. Oct. 8, 1838. F. Ayer to D. Greene.

Treaty the future possibility of removal to unceded land was left at the discretion of the President. It is also why Stuart, not withstanding this provision of the treaty, was able to reassure the Chippewa of their long term tenure on the land.

The hunting, fishing and gathering provisions of both treaties are the nexus of the practical operation of the treaties with the long term policy objective. In the practical realm, the hunting, fishing and gathering provisions were of vital necessity to the Indians. They had no other means to feed themselves or to engage in commerce with the non-Indians. If they were to remain on the land and as long as they remained on the land, these "privileges of occupancy" were a necessity. The Chippewa knew and American officials knew that there was no other means of provisioning the Indians. Although it was the idealistic goal of the United States to settle the Chippewa and induce them to take up plow agriculture, all parties concerned in the early part of the nineteenth century knew that the dream of agricultural self-sufficiency was far, far, into the future. Surely both Dodge and Stuart thought about the link between Chippewa occupancy and hunting, fishing and gathering in these terms. As the commissioners explained to the Chippewa and as the Chippewa understood it, hunting, fishing, and gathering was linked to their occupation of the ceded territory. As long as they remained on the land they were assured by the United States that they would not be impeded from the use of its natural resources.

Early Rationale for Chippewa Removal.

The Treaty of La Pointe had one immediate outcome; it permitted an influx of American prospectors and miners to enter the newly ceded territory. This was analogous to the rapid appearance of lumber men on the lands ceded at St. Peters in 1837. Much closer proximity to Americans, albeit in small numbers, combined with the collapse of the international fur market which had been the economic mainstay of the Chippewa for a hundred years created great difficulties. Now partially dependent upon trade with American lumber men and miners for manufactured goods the Chippewa were exposed to the whiskey traders who frequented lumber and mining camps.[125] More numerous encounters with American also resulted in conflicts which owed their nature to cultural misunderstanding. For example, the Chippewa sometimes obtained foods from farm fields or orchards and sometimes killed free ranging livestock in the forest. These conflicts or "Indian depredations" as they came to be called, though rare, and mostly confined to lumber settlements on the Wisconsin and St. Croix Rivers, became the rationale for the first calls for the removal of the Chippewa from ceded land in Wisconsin. As early as January 1843 Agent Alfred Brunson wrote a series of letters from his office in La Pointe reporting anger among the Chippewa over some of the provisions of the 1842 Treaty. Among the points raised by Brunson was the difficulty of enforcing the Trade and Intercourse Act in

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[125] NAM 951 R.2:583. May 21, 1844. J. Doty to H. Crawford.
ARCOIA 1843 (Nov. 25, 1843).

the ceded territory.[126] In the minds of front line agents like Brunson, as well as Superintendent Stuart and the Chippewa chiefs, exposure to intoxicating beverages was at the heart of the problem.

In February of 1844 a delegation of chiefs complained to Wisconsin Governor James Doty concerning a number of issues including the way Stuart conducted the 1842 Treaty. Their biggest concern was that they had to travel to La Pointe to receive annuities. Not only was the trip a long one for many of the Chippewa, but they had to cross each other's hunting grounds to get there. Another complaint was in the distance between blacksmith shops provided in the treaty.[127] As they told Governor Doty "we are hunters; we live by the game we kill, we cannot kill game without guns or traps; our smiths can only mend our guns and make our traps. If we have no smiths to go to what shall your Chippewa children do?"[128]

Correspondence from missionaries assigned to the Lake Superior country through the American Board of the Commission of Foreign Missions indicate a great deal of anxiety about the impact of the 1842 treaty on the mission establishments. Missionaries feared that the removal provision of the 1842 treaty would foster impermanence and

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[126] NAM M234 R. 388:390-407. Jan 6, 1843. A. Brunson to J. Doty.
MN010241. Jan. 8, 1843. A. Brunson to J. Doty.
MCT Def Ex. March 9, 1843. A. Brunson to J. Doty.
NAM M234 R. 388:403-413. July 19, 1843. A. Brunson to J. Doty.

[127] NAM M234 R. 389:111-116. Feb. 16, 1844. J. Doty to H. Crawford.

[128] NAM 951 R. 2:583. May 21, 1844. J. Doty to H. Crawford.

discourage Indian improvements such as building of houses and clearing of fields. They also worried about their own investment in mission buildings.[129] In response to an inquiry by David Greene, Secretary of the Board of the Commission of Foreign Missions as to the ultimate fate of the Chippewa under the treaty Superintendent Stuart replied that "the Indian land altho' all purchased, between the Miss[issippi] and Lake Superior, will not be required for many years, except the mineral region, as I before remarked, but it was thought best to purchase the whole country at once, so as to avoid the necessity of future treaties, and to give the Indians (who are *very poor*) some means of improving their condition and making themselves comfortable, – should they ever be required to remove, a large reservation is made, of Fond du Lac, and Sandy Lake country, as a common home."[130]

The 1842 treaty also occasioned contemplation of the future distribution of the Chippewa on the landscape in the context of providing treaty services and missions. In early 1843 Governor Doty suggested Mille Lacs as an ideal location to assign a farmer and blacksmith.[131] Likewise, Agent Boutwell recommended Mille Lacs as a locality for a new mission to replace the one at Pokegoma on the Snake River. His recommendation was based upon the fact that the region offered "two great and almost never failing resources for the support of a station *viz* fish

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[129] P41563,447. Nov. 26, 1842. D. Greene to S. Hall.

[130] ABCFM MSS Vol. 159, No. 242. Dec. 8, 1842. R. Stuart to D. Green [sic].

[131] MN 010292. March 1843. J. Doty to H. Crawford.
NAM M234 R. 388. March 21, 1843. J. Doty to H. Crawford.

and rice."[132] Another reason was that Indians from the St. Croix valley, Rum River and the Snake River were gradually moving to Mille Lacs. In September of 1843 missionaries at Pokegama reported that all their Indians were wintering at Mille Lacs lake.[133] Although Mille Lacs Indians repeatedly requested the establishment of a mission at their lake, Mille Lacs was passed over in favor of Crow Wing, Leech, and Red Lakes. The reason was that by the mid-1840's the lumber industry had reached to the lower Rum River valley and as missionary Boutwell reported the "country is inundated with whiskey."[134]

The Annual Report to the Commissioner of Indian Affairs for 1843 quotes a letter from agent Brunson who details the terrible effects of whiskey traffic on the Lake Superior Chippewa and recommends that they be removed beyond the American frontier to save them from this blight.[135] Because of the problem of controlling whiskey trade to the Chippewa and because of occasional hostile encounters which resulted between the two populations, voices began to be raised calling for removal of the Chippewa from Wisconsin. Gradually the rationale for Chippewa removal became linked to their own behavior towards whites.

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[132] AMCFM MSS BA 10a 5126 Box 3. Mar. 8, 1843. W. Boutwell to D. Green. [sic]

[133] MN 006593. Sept. 21, 1843. E. Ely to D. Green. [sic]

[134] ABCFM MSS BA 10a512b, Box 3, Mar. 13, 1844. W. Boutwell to S. Hall.

[135] ARCOIA 1843.

The linkage between bad behavior and removal must have come from the Indian and non-Indian accounts of the 1842 treaty negotiations because, as described above, the Chippewa believed they could remain in the ceded territory as long as they did not misbehave.

Pro-removal forces relied heavily on allegations of Chippewa misbehavior to generate pressure for removal and to justify it. Both Governors Dodge and Ramsey were particularly vociferous in this regard.[136] In fact, many of the so-called depredations blamed on the Chippewa were probably committed by Potawatomi and Ottawa in Wisconsin and by Sauk-Pox, Kickapoo and Winnebago in Minnesota.[137] The depredations claimed by Governor Ramsey in calling for Chippewa removal from the 1837 cession were actually the result of the activities of the Winnebago who had been removed from Wisconsin to Minnesota in 1848.[138]

Just as advocates of removal used alleged misbehavior to justify getting rid of the Chippewa, so did

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136 STMN D 10066. Mar. 21, 1847. J. Hayes to H. Dodge.
NAM M21 40:25-26. Aug. 16, 1847. W. Medill to H. Dodge.
NAM 234 R.949:432. Sept. 7, 1847. H. Dodge to W. Medill.
NAM 234 R.390:271. Sept. 11, 1849. J. Livermore to O. Brown.
MN 005474. Nov. 7, 1849. A. Ramsey to Q. Smith.

137 M951 R.2:195. Dec. 9, 1841. Anonymous to H. Crawford.
Minnesota Chronical. July 19, 1849.
Minnesota Register. July 28, 1849.
Minnesota Chronical and Register. Feb. 16, 1850.

138 NAM M842 R. 1:10-12. June 27, 1849. W. Medill to A. Ramsey.

advocates of permitting the Chippewa to remain in Wisconsin praise the behavior of the Chippewa residing in the 1837 and 1842 cessions.[139] For example, the experienced La Pointe sub-agent James Hayes reported on the behavior of the Chippewa of Wisconsin in 1847 concluding that:

> "The Chippewas as individuals, and as a nation, are well disposed, and will continue to be so as long as the cupidity and heartlessness of the whiskey dealer will permit. I fear that in our accounts of outrages and crime, we have done the Chippewa, if no other tribe, injustice in many cases; for I find on comparing them with almost any civilized community of the same size, for four years, there will be found the small aggregate of crime on the part of the savage; and any crime of any magnitude which has been committed may be traced to the influence of the white man.[140]

Among those who gave greatest praise to the good behavior of the Chippewa and who most earnestly supported their efforts to remain in the ceded territories were the lumber men and miners.[141] These first inhabitants of

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139 MN 007709. July 30, 1850. J. Giddings to President.
NAM M234 R. 168. Sept. 18, 1851. W. Boutwell to A. Ramsey.
MN 006444. Dec. 10, 1853. H. Gilbert to G. Manypenny.

140 ARCOIA 1847. Sept. 15, 1847. J. Hayes to H. Dodge.

141 ABCFM Ba10.A512b. Feb. 25, 1850. S. Hall to S. Treat.
NAM M234 R. 390. May 9, 1850. C. Mendenhall to Z. Taylor.
MN 007709 July 30, 1850. Citizens to Z. Taylor.
St. Anthony Express. Jan. 31, 1852.
Babcock Transripts [sic] MHS Box 1. Feb. 7, 1852.
NAM M348 R. 6. June 3, 1851. L. Lea to Sec. of the Interior.

the cessions were the actual neighbors and personal acquaintances of the Chippewa, people who knew them well. Certainly if the Chippewa were misbehaving these would have been the ones who would have suffered the losses and would have been the first to complain.

A long term view of Chippewa behavior indicates that they showed remarkable restraint in dealing with their non-Indian neighbors. By any measure one wishes to apply, the behavior of the Chippewa was exemplary.

* * *

Chapter 7

Attempts to Remove the Chippewa

Advance of American Settlement.

The ink was scarcely dry on the 1842 Treaty of La Pointe when discussion began about the feasibility and impact of removing the Chippewa from Michigan and Wisconsin. Despite the fact that there was no removal provision in the 1837 treaty, that the Chippewa had obtained solid assurances that they would not be removed from the 1842 cession, and that the government had no specific plans to remove the Chippewa since they occupied a region which was not being rapidly settled by Americans, the general threat of removal to lands west of the Mississippi nonetheless, became a reality.

Soon after the La Pointe treaty when Robert Stuart was questioned on the subject, he responded that "early removal was not in conformity with the spirit of the

treaty.[174] Late in 1845 the U.S. Senate inquired of the President if the provision of the 1842 treaty to cancel hunting and fishing privileges and require removal from the mineral district had been implemented. Commissioner of Indian Affairs Hawley Crawford replied that:

> It could scarcely have been within the contemplation of either of the parties to it that the Indians should be required to remove very soon, under the provision of the 6th Article. It is true they are subject to removal "at the pleasure of the President" and, of consequence, may be removed now, or in some short time; but the indefinite terms used were not probably understood to mean at the end of one or even two years, or the provision would have been absolute, and a precise time fixed. I think, therefore, there will be great hazard of serious dissatisfaction on the part of the Indians, if the power conferred by the treaty on the government shall be enforced upon them.
>
> I would by no means wish to retard the opening of the mines referred to, which are said to be chiefly in Michigan, nor would I recommend any course likely to produce that effect, unless imperiously compelled thereto by law or duty. I think, however, the presence of the Chippewas will not interfere, for some time to come, with the mining operations of our citizens who may choose to engage in them. When it is found to do so, we can act; for the present, I would

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[174] NAM M234 R. 388. June 2, 1843. R. Stuart to H. Crawford.

advise no step that could be tortured into harshness towards these poor people . . . [175]

In August of 1848 missionary Sherman Hall at La Pointe wrote to his superior S. B. Treat about the removal anxiety arising from the 1842 treaty and argued against removal:

> What is to be done with the Indians on the ceded territory is a matter of anxious inquiry both among them and us. They have obligated themselves to remove when required by the President of the U.S. When the time will come is uncertain. Rumors have been afloat that it will be soon. But I do not see any particular reason why they should be required to remove at present. I feel certain that this region is not to be settled very extensively at present. There is too much good land in a better climate unoccupied, which will attract farmers before these barren regions. We have a healthy climate and some tolerable soil, but neither are particularly inviting to farmers. The mining excitement has in a great measure subsided, and most who have engaged in the business have found it a more serious and expensive business operation to dig copper, than they anticipated. There may be valuable mines in the country, but they do not exist everywhere, as was for a time supposed. I see no particular motive therefore to call a great number of settlers to this region at present. Why then should the Indians be required to remove?[176]

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[175] Senate Document 403 (29-1)477 June 24, 1846. Message from the President of the United States in compliance with a resolution of the Senate.

[176] ABCFM MSS 245:No. 72. August 12, 1848. S. Hall to S. Treat.

A very similar view can be found in a petition forwarded to President Taylor by the American community on Lake Superior.[177]

It would seem that in the general view of the Indian Office the timing of removal if it occurred at all was tied to the rate of agricultural settlement in the Great Lakes-Upper Mississippi Valley region, that is, as Dodge put it, if and when "the President might require the land for the use of his white children."[178] By the mid-1840's two things were clear: Chippewa occupation of the territory ceded in 1837 and 1842 did not conflict in any major way with lumbering and mining activities and the rapid American settlement of the region anticipated in earlier decades had not materialized.

In his study of the advance of the American settlement frontier in the upper midwest, historical geographer Robert Ostergren points to two primary considerations on the understanding of the way settlement advanced: settlement did not advance in a uniform manner and there is also a clear difference in the timing of settlement.[179] The settlement of Wisconsin and Minnesota are part of two separate population movements. One was a northwesterly expansion from population centers at

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[177] NAM M234 R. 390. July 13, 1850. J. Watrous to A. Ramsey.

MN 007709 July 30, 1850. Citizens to Z. Taylor.

[178] NAM T494 R.3:548-568. July 20, 1837. Journal of a council . . . p. 27.

[179] Ostergren, Robert C. 1981 Geographic Perspective on the History of Settlement in the Upper Midwest. *Upper Midwest History* Vol. 1. pp. 27-39.

Green Bay and from the Illinois River at Peoria as well as the Mississippi River at Dubuque (Map 4). The Wisconsin and Fox Rivers were important pathways in this push of agrarian settlement northwest through the choice oak-opening of southern Wisconsin. The other important route of settlement was the Mississippi River. The first wave of settlement was dominated by timber extraction and trading interest centered at the Falls of St. Anthonys (Minneapolis) and in the St. Croix valley. Later, immigrant farmers established agricultural settlements in southwestern Minnesota and north to the Red River valley. Just as in the case of Wisconsin, settlement proceeded from southeast toward the northwest. In this flow of American settlement the conifer dominated regions of the interior northern Wisconsin, the south shore of Lake Superior, and the hinterlands of northeastern Minnesota were by-passed.

By long tradition among American demographers and historians studying the American frontier "American settlement" has been defined as the point at which the non-Indian population of a region reaches two persons per square mile. It was not until 1890 that the remaining unsettled portions of the eastern United States was so broken up by settled areas that the region as a whole was declared "settled' that is, the American frontier had passed to the west.[180] Even so, large tracts of unsettled land remained behind the settlement frontier.

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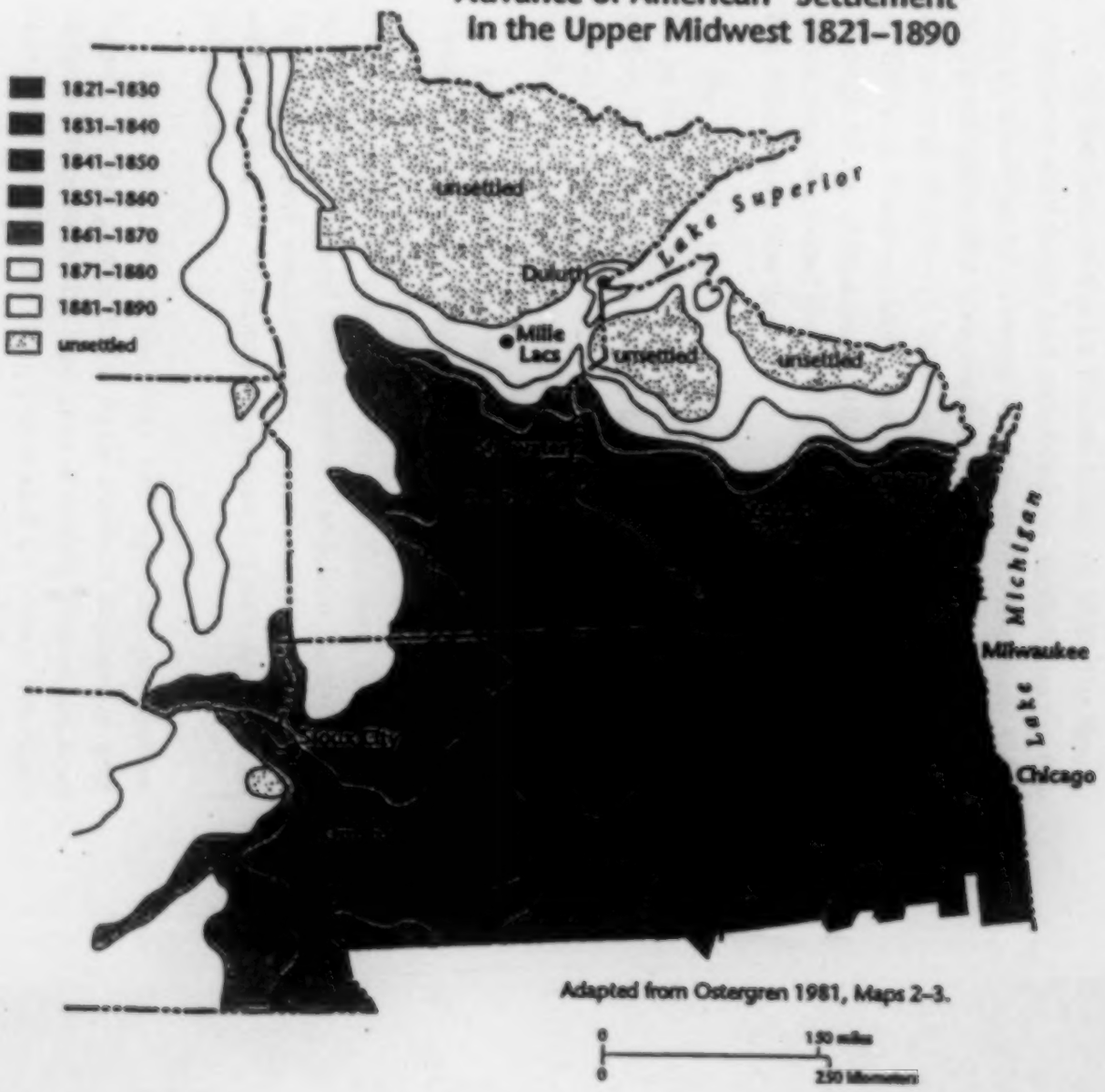
[180] Ostergren, 1981:29.

Map 4
Advance of American "Settlement" In the Upper Midwest 1821–1890



Adapted from Ostergren 1981, Maps 2–3.

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By the time of the La Pointe treaty of 1842, the line of American settlement had extended no farther than a few dozen counties in extreme southeastern Wisconsin (Map 5). In addition, the area around the old Green Bay settlements and the newly established lumbering community at Steven's Point on the upper Wisconsin were populous enough to be considered settled. This was also true of a small region around the new lumber town of Stillwater in the Minnesota Territory.

By 1850 the line of settlement had advanced only so far as to include the counties southeast of a line between Green Bay and Des Moines, Iowa. To the north, the only settled areas were the regions immediately around Ft. Snelling, St. Paul, St. Anthony and Stillwater.

In the year following the 1837 cession under the Treaty of St. Peters, a Wisconsin Territorial census shows 850 non-Indians occupying Crawford county which extended from the Wisconsin river to the Red River valley of Minnesota and north to the Canadian border.[181] In 1842 Crawford county which now included only the western half of Wisconsin contained 1,449 non-Indian inhabitants.[182]

The year 1850 is the first that specific population figures can be gathered for both western Wisconsin and eastern Minnesota. In that year western Wisconsin was composed of St.Croix, Chippewa and La Pointe counties

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[181] 1838 Census. Microfilm, State Historical Society of Wisconsin, Madison.

[182] 1842 Census. Microfilm, State Historical Scoeity [sic] of Wisconsin, Madison.

which together had 1,728 non-Indian residents.[183] Eastern Minnesota at the same time was divided into Benton, Ramsey and Washington counties (Map 6). In total these counties had a non-Indian population of 6,038 people.[184] Of these, 5,146 lived in the towns of St. Anthony, St. Paul, Stillwater and St. Croix Falls leaving only 892 non-Indians in all of the surrounding territory. Most were residents of lumber camps or lived on scattered farmsteads between St. Anthony and Crow Wing on the Mississippi River.

Lumbering began in the lower Rum and St. Croix valleys in the early 1840's and by late in the decade had begun on the upper tributaries of these rivers. In 1849 the upper Rum was cleared of obstacles in preparation to floating logs to downstream mills. In 1850 six million board feet was cut on the upper Rum and as operations extended to Mille Lacs, the amount rose to 9 million feet in 1851, 11 million in 1852 and 23 million board feet in 1853. At the time, lumber sold for six dollars per 1,000 board feet.[185]

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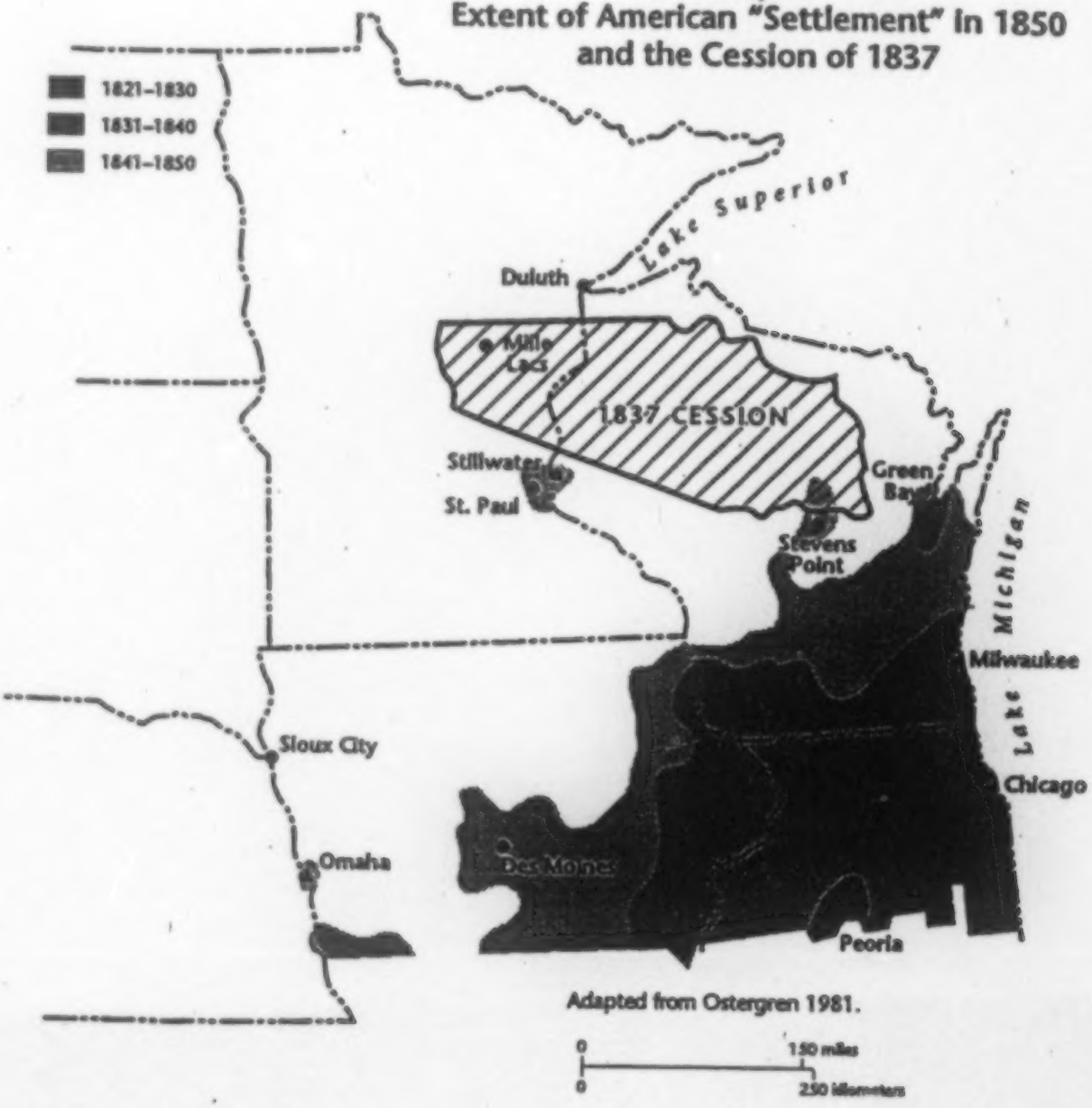
[183] U.S. Dept. of Interior, Census Office 1883. Statistics of Population of the United States of the Tenth Census. Washington D.C.:U.S. Government Printing Office.

[184] DeBow, J.D.B. 1854 Statistical View of the United States. A Compendium of the Seventh Census. Washington, D.C.:A.O.P. Nicholson Public Printers.

[185] Stanchfield, Daniel 1901 History of the Pioneer Lumbering on the Upper Mississippi and its Tributaries. *Minnesota Historica* [sic] *Society* Vol. IX:342-43.

Map 5
Extent of American "Settlement" in 1850 and the Cession of 1837



Adapted from Ostergren 1981.

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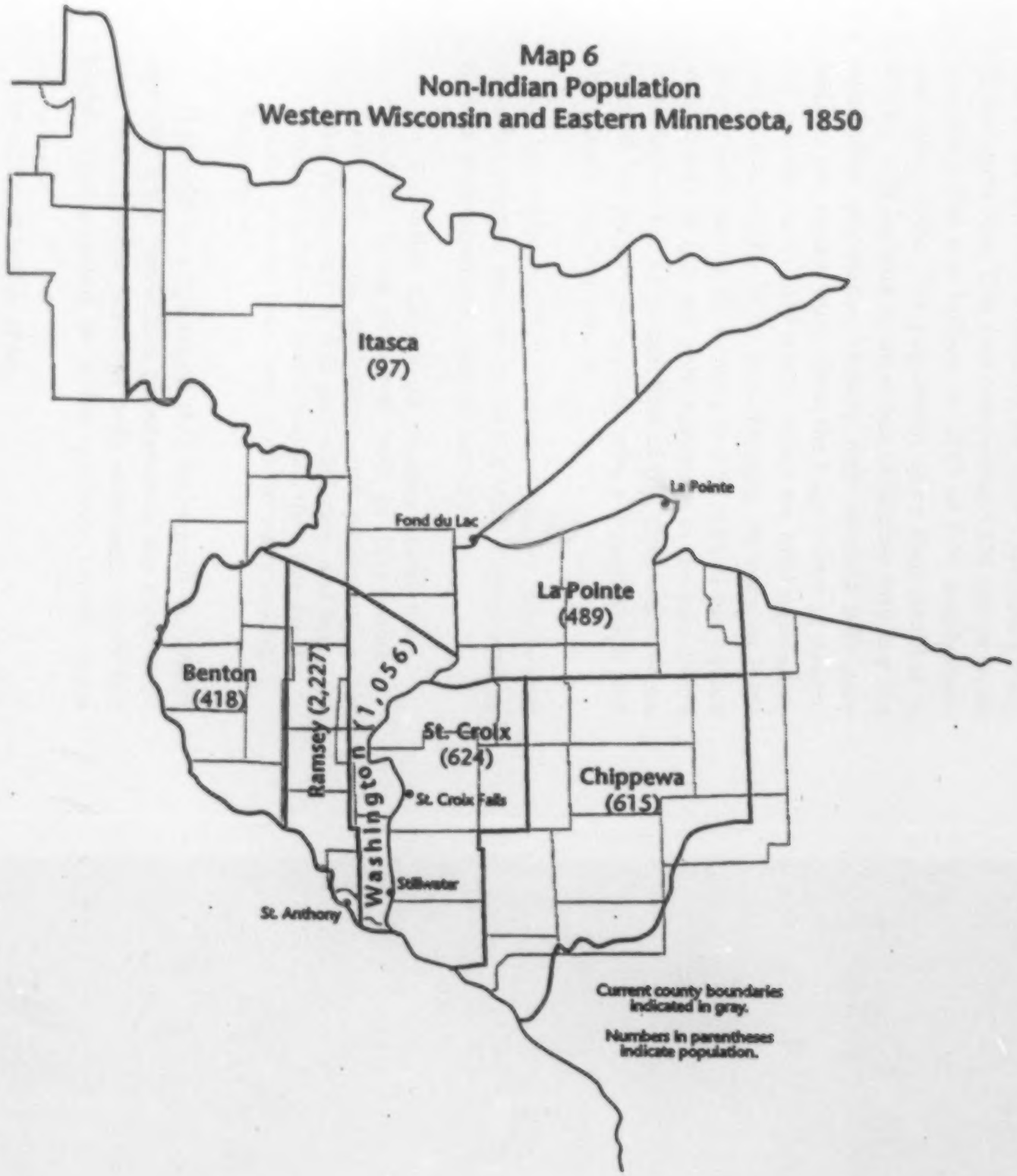
Map 6
Non-Indian Population
Western Wisconsin and Eastern Minnesota, 1850



Despite this activity in 1850 the non-Indian population of the territory hunted by the Mille Lacs bands (Map 7) was quite low. This area comprising 9,434 square miles contained 434 non-Indians in 1847 or 0.05 non-Indians per square mile. The population more than doubled to 892 by 1850 because of an influx of lumber men but the non-Indian population density only reached 0.09 non-Indians per square mile. Even the huge influx of American population in 1857 which raised the total non-Indian population of the Mille Lacs hunting territory to 5,984 people only raised the density to 0.63 settlers per square mile. It was in fact not until sometime in the mid 1870's that the non-Indian population of the Mille Lacs region reached 2.0 people per square mile, a figure which met the criteria for "settlement".

In his report for 1850, Governor Ramsey commented upon the relative remoteness of the Mille Lacs people as well as their abundant natural resources:

> The Mille Lacs band number about three hundred. Being removed forty or fifty miles from any white settlement, and possessing a lake abounding in fish and wild rice, and bordered by extensive maple groves, they live amid greater plenty than any of their surrounding brethren.[186]

It should be emphasized that throughout the 1840's and 1850's the non-Indian population of the entire 1837 and 1842 cessions was not only extremely small but highly concentrated in a few pioneer towns, most

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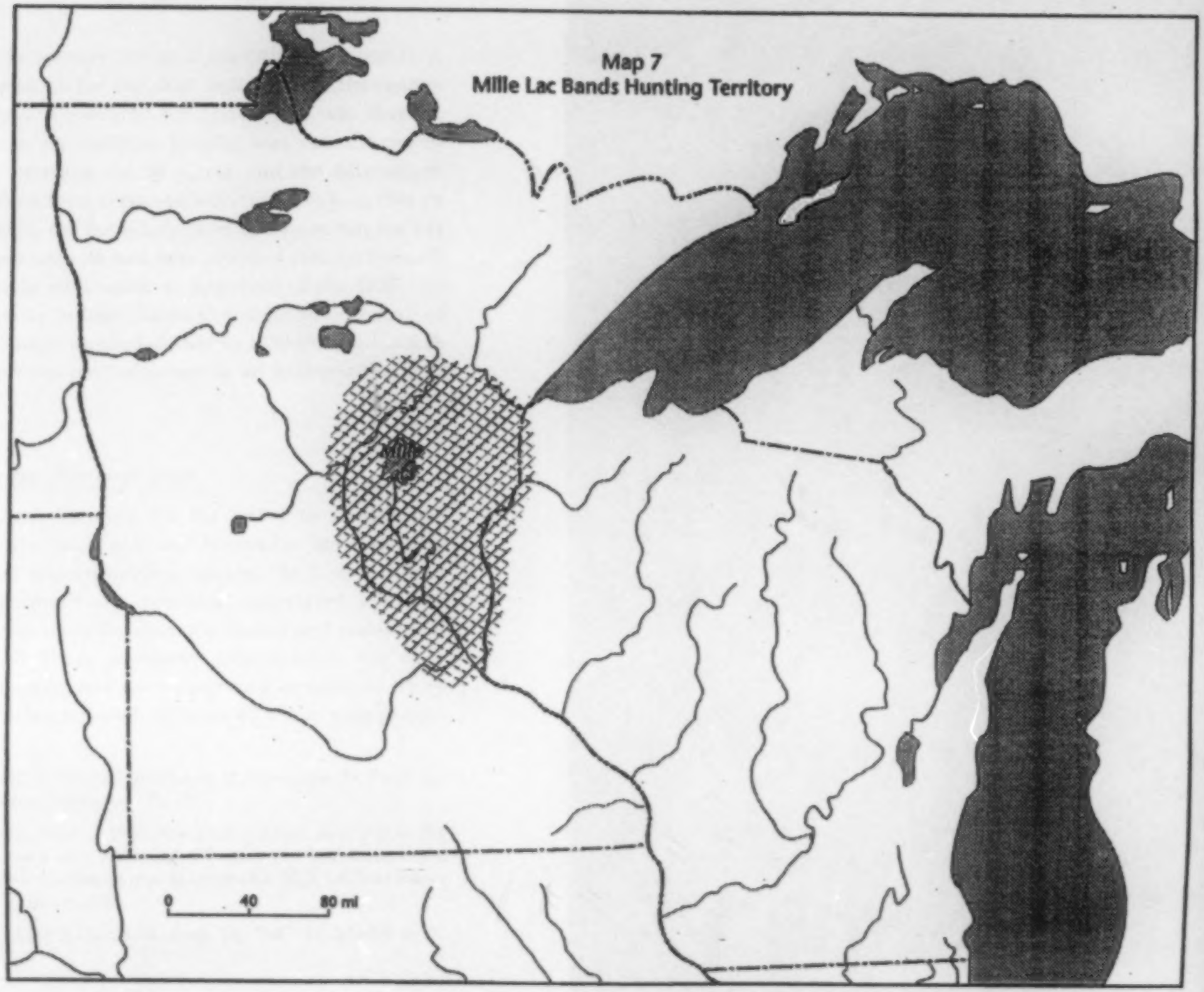
[186] ARCOIA 1850 p. 87-88.


Map 7
Mille Lac Bands Hunting Territory
0
40
80 mi

on the extreme western fringe of the 1837 ceded territory. One of the reasons for the slow settlement of the region, besides its poor conditions for agriculture, was that the land survey, a precondition to sale, was not ordered in the country between the St. Croix and the Mississippi until 1846. Even then, it proceeded very slowly, so that by the end of 1850, the boundary lines had been run for 144 townships but only 34 had been divided into sections.[187] Walter Kuehnle who wrote an appraisal of the 1837 cession area for the Indian Claims Commission on behalf of the United States, concluded that in 1850 the land which comprised the cession "remained as an uncharted wilderness area."[188]

Impetus for the Removal Effort.

In fact, the impetus for the effort to remove the Chippewa from Michigan and Wisconsin between 1849 and 1852 had two underlying causes. The first and least important involved the problems associated with the interaction and trade between the Indian and non-Indian population.[189] These problems originated in the non-Indian community and were magnified in order to try to justify Chippewa removal. Unlicensed trade, unapproved

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[187] Folwell, W.W. 1956 *A History of Minnesota*. St. Paul:The Historical Society Press, pp. 356-357.

[188] Kuehnle, Walter 1966 *Appraisal of Royce Area 242 in the State of Wisconsin and Minnesota*. Docket no. 18C before the Indian Claims Commission Microfiche N.Y.: Clearwater Publishing Co. Inc. p. 139.

[189] NAM M21 R. 40:25-26. Aug. 16, 1847. W. Medill to H. Dodge.

timber contracts and especially illegal sale of whiskey to Indians had long been a problem on the American frontier. The federal government attempted to control the situation by imposing the Trade and Intercourse Act of 1834. These attempts ran afoul of the State of Michigan and after 1848 with the State of Wisconsin which objected to the extension of federal law to their respective jurisdictions.[190] Wisconsin Territorial Governor Henry Dodge became a strong advocate of removal as a solution to what he perceived to be his state's Indian problem.[191] Like many of his contemporaries, he argued that the welfare of both the Indian and American citizenry would be served by removing the Indians west of the Mississippi where they would be beyond the bounds of the evil influence of whiskey traders. Here they could be formed into colonies where they would be taught the arts of civilized life. These arguments on behalf of the Indians did not reflect their view but definitely promoted the interest of those who sought to profit from removal.

Secondly, and far more important in the removal effort was the conspiracy of a small number of Whig politicians in Washington and in the Minnesota Territory who were anxious to draw Indian patronage jobs and annuity money to the Minnesota Indian jurisdiction. Until the time of the Civil War, Indian annuities were paid in gold or silver coin. On the cash strapped frontier this currency was eagerly sought by Indian traders and their

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[190] NAM M842 R. 1:8. April 24, 1849. Wm. Medill to J.E. Fletcher.

[191] Docket 18C, Ex. 85. Nov. 28, 1846. H. Dodge to J. Hays. Docket 18C, Ex. 89. Mar. 26, 1847. H. Dodge to W. Medill.

merchant suppliers. For example, Daniel Stanchfield who opened a store in St. Anthony in 1849 lamented that he had no access to the Indian trade. As he explained, "nearly all the money that came into the country consisted of government annuities paid to the Indians. It passed into the hands of the Indian traders, who had it all promised before the government made the payment."[192]

Besides the flow of hard currency, Indian agencies provided money to build and operate agencies, schools, farms, and blacksmith establishments including the employment of skilled workers to staff these facilities. Likewise, lucrative supply and transportation contracts were also part of the Indian system.

Changes in the way the Indian system was administered in Washington as well as a new administration helped to enhance the chances for Minnesota to capture Indian patronage. When the Whig party under Zachary Taylor won election in 1848, Thomas Ewing was appointed Secretary of the newly created Department of the Interior which in turn absorbed the Office of Indian Affairs from the War Department. Ewing was an aggressive advocate of the spoils system and set out to control the immense patronage his position afforded. Orlando Brown, appointed for purely political reasons as Commissioner of Indian Affairs, lasted in office for only a year. He was disliked by Ewing who personally controlled

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[192] Stanchfield, Daniel 1901 History of Pioneer Lumbering on the Mississippi and its Tributaries. *Minnesota Historical Society* Vol. IX, p. 341.

Indian Affairs.[193] Ewing also was in league with Indian traders and authorized the payment of dubious trader claims against Indians for which Orlando Brown took great heat from the Democratic press.

Another key player in Chippewa removal was Minnesota trader Henry Rice whose career spanned the last fifty years of the nineteenth century. During the winter of 1849 and 1850, Rice spent most of his time in Washington lobbying Brown and Ewing to remove the Wisconsin Chippewa to Minnesota. Among other interests, he hoped to get the contract for the actual removal; in this he was opposed by Territorial delegate Henry Sibley who likely hoped to get it for himself.[194]

In December 1849 Rice wrote a confidential letter to newly appointed Whig Governor of the Minnesota Territory Alexander Ramsey recommending Chippewa removal from the 1842 cession. His interest was not with the fate of the Chippewa but the white merchants of Minnesota. As he advised Ramsey, "They should be removed from the ceded lands – they should receive their annuities on the Mississippi River [rather than at La Pointe] say at or near Sandy Lake, at which place an agency for the whole tribe should be established. This would better accommodate the whole tribe – and Minnesota would reap the benefit – whereas now their annuities pass via Detroit and not one dollar do our inhabitants get

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193 Trennert, Robert 1979 Orlando Brown 1849-1850 in *The Commissioners of Indian Affairs 1824-1977*. ed. by R. K. Vasnicka and H. J. Viola. Lincoln: University of Nebraska Press.

194 Lake Superior Journal May 22, 1850 "Indians to be Removed from Lake Superior."

– alth'o we are subject to all the annoyances given by those Indians."[195] Rice was particularly hopeful for an infusion of annuity money into St. Paul where he was involved in real estate investments with Ramsey's brother and Henry Sibley.[196]

The Territorial Resolution.

In September of 1849 Ramsey complained to the Territorial Assembly of Minnesota about Chippewa hunting and suggested a memorial to the U.S. Congress asking for their removal from the ceded territory. In fact, the complaints against the Chippewa were trumped up as the actual complaints of settlers were neither from the 1837 cession nor committed by the Chippewa. In his message to the Territorial Assembly on September 4, 1849, Ramsey reported that "[m]uch complaint is made by the settlers about Sauk Rapids, Swan River, etc. of the demoralizing effects of the privilege given the Chippewas, in the Treaty of 1837, to hunt and fish upon the lands ceded by said Treaty."[197] Sauk Rapids and Swan River were the territories ceded by the Chippewa in 1847 and by 1850 occupied by Winnebago. During the summer of 1849 local newspapers reported difficulties between the settlers and the Winnebago including an incident in which two German

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195 AR M203 R. 4, Dec. 1, 1849. H. Rice to A. Ramsey.

196 AR M203 R. 4, Dec. 1, 1849. H. Rice to A. Ramsey. AR M203, R. 4. Mar. 14, 1850. H. Rice to A. Ramsey.

197 Alexander Ramsey Papers M. 204 R. 2, Vol. 2, p. 10. Sept, 4, 1849. Message of the Governor.

Immigrants were shot by several Winnebago in an incident involving liquor.[198] The Governor was informed of this situation and because he had received a list of various claims for Indian depredations in the Minnesota Territory that same summer, he knew that the so-called Indian problems were not with the Chippewa of the 1837 cession.[199] The inexperienced Winnebago agent at Crow Wing, J.E. Fletcher wrote to Ramsey in late September reporting that the "Chippewas of the Mississippi – their bands contain a population of about eleven hundred and have their villages at Gull Lake, Sandy Lake, Mille Lac and Rabbit Lake. Respecting the former character of these Indians, I know but little, but since they have been under my charge, for the year past, I have found them peaceable, temperate and industrious."[200] Nevertheless, Fletcher then goes on to suggest that the time is ripe "to require that the privilege granted the Chippewas to occupy, for a limited period the country purchased of them in the treaty of 1842 should terminate." In the original manuscript the date is over written to change the "42" to a "37".[201] Obviously Fletcher was confused about the details of the two treaties. Though his interest was to remove the Mississippi Chippewa to his newly established agricultural colony at Crow Wing, he seemed

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[198] *Minnesota Chronicle* July 19, 1849. Also *Minnesota Register* July 28, 1849.

[199] NAM M842 R. 1:10-12, June 27, 1849. W. Medill to A. Ramsey.

[200] NAM M234 R. 428:77-80. Sept. 22, 1849. J. Fletcher to A. Ramsey.

[201] NAM M234 R. 428:77-80. Sept. 22, 1849. J. Fletcher to A. Ramsey.

unaware that it was the 1842 and not the 1837 treaty which contained a removal provision.

Governor Ramsey seems to have operated under a similar confusion. At Ramsey's urging the Territorial Legislature passed the following joint resolution calling for removal of Chippewa Indians:

> Resolved by the Legislative Assembly of the Territory of Minnesota, that to ensure the security and tranquillity of the white settlements in an expansive and valuable district of this territory, the Chippewa Indians should be removed from all lands within the Territory to which the Indian Title has been extinguished, and that the privileges given to them by Article Five of the Treaty of July twenty sixth, one thousand, eight hundred and thirty seven, with the Chippewa Indians & c. and Article Second of the Treaty with the Chippewas of the Mississippi October fourth one thousand, eight hundred and forty two be revoked
>
> Resolved that the Honorable Henry H. Sibley, Delegate from this territory to the Congress of the United States, be and is hereby requested to urge Congress the necessity freeing the Territory from the Indian population within its limits, so far as it has been ceded; and to locate them on such country as the General Government shall judge best calculated for their residence and to which the white settlements may not yet be extended.
>
> Resolved that his Excellency the Governor of this territory be requested to transmit one copy of the foregoing resolutions to the Honorable H. H. Sibley, Delegate to Congress from this territory; to the Honorable the President of the

> Senate, to the Honorable Speaker of the House of Representatives, and to the Honorable Secretary of the Home Department.[202]

This resolution is similar to Indian removal petitions forwarded from time to time by other States including both Michigan and Wisconsin except in one significant respect. Minnesota was petitioning Congress to remove the Chippewa not only from its own territory, but also from the States of Michigan, Wisconsin to Minnesota. None of the land ceded in 1842 was in the Minnesota Territory; the only purpose for referring to the 1842 Treaty in the resolution was to remove the Wisconsin and Michigan Chippewa to Minnesota because virtually none of the Lake Superior Chippewa resided in Minnesota. One other point is noteworthy: while the hunting, fishing, and gathering provisions of both Article 2 of the 1842 treaty and Article 5 of the 1837 treaty which are cited in the resolution refer to the President, the Assembly directed its request for removal to the United States Congress. Delegate Sibley was, in fact, expressly directed to urge Congressional action. The reason why this request was routed through Congress was probably the result of the fact that the 1837 treaty did not give the President the authority to remove the Chippewa from that cession.

The Presidential Order of February 6, 1850.

In any case, Congress forwarded the Territorial resolution to President Zachary Taylor who, on February 6,

[202] NAM M234 R. 428:124-128. Nov. 7, 1849. Joint Resolution of the Minnesota Territory Assembly.

1850 issued an order canceling usufruct rights granted under the 1837 and 1842 treaties and ordering removal of the Chippewa from the ceded territory. The text of the order is as follows:

> The Privileges granted temporarily to the Chippewa Indians of the Mississippi by the Fifth Article of the Treaty made with them on the 29 of July 1837, "of hunting, fishing and gathering the wild rice upon the lands and rivers and the lakes included in the territory ceded" by that treaty to the United States; and the right granted to the Chippewa Indians of the Mississippi and Lake Superior, by the Second Article of the treaty with them of Oct. 4, 1842, of hunting on the territory which they ceded by that treaty, "with the other usual privileges of occupancy until required to remove by the President of the United States," are hereby revoked; and all of the said Indians remaining on the lands ceded as aforesaid, are required to remove to their unceded lands.[203]

The wording of the order in respect to the 1837 treaty refers to the privileges granted to the "Chippewa of the Mississippi." The order assumes that the Indians of the 1837 cession were under the same obligation to remove as those who signed the 1842 Treaty. This was not the case.

It is apparent from the executive order that, like the Chippewa, the United States saw hunting, fishing, and gathering as a necessary part of occupation of the land. Cancellation of the means to subsist was intended to force the Chippewa to remove. As a practical matter there

[203] NAM M21 R. 43:23. Feb. 6, 1850. O. Brown to A. Ramsey.

was no way the Chippewa would simply stop feeding themselves from the land. Everyone understood that as long as the Chippewa were resident in the ceded territory they would be permitted to hunt, fish, and gather.[204]

Attempts to Implement the Removal.

While these events were transpiring, the Chippewa and their supporters had been lobbying against the removal effort. By 1850 it was known that the unceded country west of Lake Superior held valuable mineral resources. The Chippewa had already turned down an attempt by the United States to buy these lands in 1847 and now, perhaps, hoped to use these lands to obtain reservations in the 1837 and 1842 ceded territory. In the winter of 1849 a Chippewa delegation in Washington tried to get the government to agree to provide 24 reservations for the "bands resident throughout the territory ceded in 1837 and 1842."[205] Some American officials feared that Chippewa opposition to removal was so strong that troops would be required to both accomplish removal and to keep them in the west.[206] Eventually, however, it was decided to form a "northern Indian colony" by removing the Chippewa to either Sandy Lake or

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[204] NAM M234 R. 767:159-163. Feb. 12, 1851. A. Ramsey to L. Lea.

[205] Petition of Chiefs of Lake Superior Chippewa, 30th Congress, 2nd Session, Misc. No. 36.

[206] NAM M21, R. 38:237-239. Oct. 31, 1846. W. Medill to H. Dodge.
MN 007317. Sept. 7, 1847. H. Dodge to W. Medill.

Crow Wing; this would be a counterpart to the Indian Territory in Oklahoma.[207]

Much to the disappointment of both Rice and Sibley, Secretary Ewing appointed the failed La Pointe Chippewa trader and Whig politician John Watrous as special agent for removal in April of 1850. The removal team of Ewing, Brown, Ramsey, and Watrous was now in place with Ramsey having almost exclusive discretionary power. By late March 1850 word of the removal order was received by agent Livermore at La Pointe and by April the Chippewa were notified of the intent of the government to remove them.[208]

In the planning and implementation of the order, it is clear that the focus of the effort was on the six bands who occupied the Wisconsin portion of the 1837 and 1842 cessions. Livermore was instructed to hire one man to remove each of the six Wisconsin bands.[209]

Since the chiefs believed there was no just cause for their removal and that requiring them to do so was beyond the dignity and honor of the Great Father, they came to believe that the removal effort was a plot hatched by government underlings. They made this point in a letter to the President:

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[207] ARCOIA 1848.

[208] ARCOIA 1850.
NAM M2234 R. 390:387. A. Ramsey to J. Livermore.

[209] NAM M234 R. 390. Mar. 4, 1850. A. Ramsey to J. Livermore.
NAM M234 R. 390:375. Mar. 4, 1850. A. Ramsey to O. Brown.
NAM M234 R. 390. Apr. 20, 1850. A. Ramsey to COIA.

> We have been ready to listen to the words of our Great Father whenever he has spoken to us, and to accede to his wishes. But this time, in the matter of our removal, we are in the dark. We are not satisfied that it is the President that requires us to remove. We have asked to see the order, and the name of the President affixed to it, but it has not been shown us. We think the order comes only from the agent [John Watrous] and those who advise him and are interested in having us removed.[210]

Commissioner Brown asked Governor Ramsey to select a new agency site to replace La Pointe and after some debate Ramsey chose Sandy Lake. Moving the agency was a part of a plan formed by Brown, Ramsey, and Watrous to lure the Chippewa west with annuity payments as well as to bring the annuity funds to the Minnesota Territory. Henceforth annuities due under the 1837 and 1842 treaties would not be paid on ceded ground. Because Congress had not yet appropriated removal funds, no action was taken to remove the Chippewa during the summer of 1850.[211] The Chippewa were notified that they could collect their annuities at Sandy Lake in the fall.

During the spring and summer, the citizens of the ceded territory, missionaries and newspapers mounted a vigorous campaign against removal. Missionary Sherman Hall wrote that " . . . there are no inhabitants who urge

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[210] LCO-Voight, Ex. 1. Nov. 6, 1851. Buffalo et al to Commissioner of Indian Affairs, L. Lea.

[211] NAM M234 R. 390 M 946. Aug. 16, 1850. A. Ramsey to Commissioner of Indian Affairs.

their removal. The land is not wanted for settlement. Most of those here [La Pointe] would prefer that they remain on account of the fish and fur trade." Respected citizen Cyrus Mendenhall made the same point in a letter to President Taylor.[212]

The collusion of private interest involved in removal did not go unnoticed in the press. The *Lake Superior Journal* of May 22, 1850 ran a story questioning the purpose of Chippewa removal which, they pointed out, was not only "enormously expensive to the Nation but of "great dissatisfaction to the Indians." The story goes on to add:

> The delegate from Minnesota, Mr. Sibley, Mr. Rice, till lately one of his partners in the Choteau branch of the old American Fur Company and Dr. Borup, present agent of the same company, at St. Paul, could, we doubt not more fully explain these Indian removals than anybody else; but as they would be the last ones to do so, we venture to notice a few features of the scheming system that has been carried on for years in order to make their headquarters the center of attraction, as well for all the money that is paid to the Indians of the Northwest, as for the peltries that are collected by them. The company enjoys an almost perfect monopoly of the trade with the Indians in this region, and it looks as if this monopoly has been secured for

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[212] ABCFM MSS 245 No. 87. Feb. 25, 1850. S. Hall to S.B. Treat.

MCT Pla Ex. 400 May 24, 1850. C. Mendenhall to Z. Taylor.

sometime to come by this plan of removing the Chippewas from Lake Superior.[213]

Neither was the collusion of politicians and traders lost on the Indians. Sherman Hall told Ramsey "The Chippewa believed that this project was set on foot by their agent and others interested to get their payments and themselves removed to the Mississippi; and an affair to make money out of it."[214]

In July a group of respected citizens of the south shore of Lake Superior sent a petition to President Taylor stating "That we unhesitatingly believe such removal wholly uncalled for by any interest of the Government or people of the United States, and that it would be in a high degree prejudicial to the welfare of the Indians." Their petition also praises their good relations with the Chippewa, "that the most friendly feeling, strengthened by mutual kind offices has at all times, existed between the Indians and ourselves."[215]

By the fall of 1850 Ramsey and Watrous had developed a secret plan to effect removal. First the Chippewa would be urged to bring their families to the Sandy Lake payment and then the payment would be delayed until after the close of canoe navigation to trap the Chippewa at Sandy Lake. Indeed, this insidious plan was carried out but was in part thwarted by the Chippewa who sent only

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[213] *Lake Superior Journal*, May 22, 1850. Indians to be Removed from Lake Superior.

[214] AR M203 R. 6, Dec. 3, 1851. S. Hall to A. Ramsey.

[215] MCT Def. Ex. 60. July 30, 1850. J.R. Giddings to President.

men to collect vital annuity payments. When they got to Sandy Lake in late October, agent Watrous was not present and there was little food to feed the assembled men. Starvation and disease set in and during the six weeks the Chippewa waited for Watrous, about 170 died and were buried at Sandy Lake. Finally, agent Watrous appeared and dispensed the annuity goods but the worst of this disaster was only beginning. James Clifton, who studied the Sandy Lake incident, reports that on December 3 with full winter upon them the Chippewa headed home to Wisconsin which was a distance of three to four hundred miles.[216] Since the canoe routes were frozen, the men had to abandon their canoes and carry their annuities overland through a foot of snow. Exposure, starvation, and disease caused the deaths of 230 more men on the homeward trip. Clifton has estimated that the Ramsey-Watrous scheme resulted in the loss of 12 percent of the Wisconsin Chippewa population. Perhaps, more important, the Sandy Lake affair cost the Wisconsin Chippewa at least one third of their able-bodied hunters, a disaster for a population of hunters and gatherers.

Despite the continuing outcry of missionaries, the press and the Indians themselves, Ramsey and Watrous continued to plan for removal the following summer.[217] Orlando Brown resigned his office on July 1, 1850 and

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[216] Clifton, James. 1987 Wisconsin Death March: Explaining the Extremes in Old Northwest Indian Removal. *Transactions of the Wisconsin Academy of Arts, Letters and Sciences* 75:1-39.

[217] ABCFM Ba.10A512b. Dec. 30, 1850. S. Hall to S. B. Treat.
MN 007747 n.d. 1851. Petition of *Kewanlee* et al.
MN 00971 July 22, 1851. J. Watrous to Col. Harding.

was replaced by Luke Lea. But when President Taylor died soon after, Ewing also resigned as Secretary of the Interior. Under the new Fillmore presidency, Ramsey consolidated his power over Indian affairs in Minnesota to an even greater degree, and with the help of Henry Sibley managed to both isolate himself from the Sandy Lake disaster and to assume complete control over removal.[218]

Under the direction of Ramsey and Watrous, removal agents were appointed who had the trust of the Chippewa. Men like William Warren, William Boutwell and Clement Beaulieu were appointed in 1851 and sent inland to locate the Chippewa and get them started west. Indians from the Lake Superior shore and inland Wisconsin were to be temporarily moved to Fond du Lac, the closest unceded territory, while those at Pokegoma and the St. Croix valley would be moved to Mille Lacs.[219] Of particular concern were the Chippewa of the St. Croix, Pokegama and Rum River bands who were being supplied with liquor by lumber men. Governor Ramsey feared hostility in the region because lumber dams were flooding and destroying the rice beds on which the Chippewa depended so heavily. Watrous and his new ally Sherman Hall purported to remove these bands to Mille

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[218] AR M203 R. 5. Dec. 4, 1850. H. Sibley to A. Ramsey.
AR M203 R. 5. Dec. 10, 1850. H. Sibley to A. Ramsey.

[219] ABCFM Ba. 10.A512b. Mar. 24, 1851. S. Hall to S.B. Treat.
ABCFM Ba. 10.A512b. May 19, 1851. S. Hall to S.B. Treat.
ARCOIA 1851 p. 86.
NAM M234 R. 168:M32. Feb. 10, 1851. A. Ramsey to J. Watrous. Enclosed with NAM M234 R. 767:159-163.
Feb. 13, 1851. A. Ramsey to L. Lea.

Lacs although many had already done so voluntarily to escape the ravages of the lumber industry.[220] Indeed, the ample fish and rice resources at Mille Lacs made it a favorable destination for Chippewa removed from other places.[221]

The removal agents including John Watrous himself asserted that all Chippewa must remove from ceded land without exception. No further government support for schools, farmers, blacksmiths would be forthcoming on ceded land and that while the government could not require them to move further than unceded lands west of Lake Superior it wished them to settle west of the Mississippi at Crow Wing. Here a large agricultural and mission station would be established.[222] Watrous promised La Pointe missionary Sherman Hall supervision of the Crow Wing mission and school and he too now became a removal advocate.

Despite Watrous' proclamation there is no evidence of an effort to remove the Mille Lacs band. In fact, both Ramsey and Watrous discussed moving other bands to

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[220] NAM M842 R. 31:637-642. Feb. 28, 1851. J. Watrous to A. Ramsey.
ABCFM Ba10A.512b. Box 5. Mar. 24, 1851. S. Hall to S. Treat.

[221] NAM M234 R. 428:265-267. Apr. 25, 1850. C. Beaulieu to A. Ramsey.
NAM M234 R. 767:234. May 13, 1851. J. Watrous to A. Ramsey.

[222] ABCFM Ba10.A512b. Box 5. Aug. 27, 1851. S. Hall to S. B. Treat.

Mille Lacs providing farmers and other assistance to them.[223]

The Wisconsin Chippewa dug in their heels. They would not remove to Sandy Lake which they now regarded as a graveyard. They protested the behavior of Watrous and petitioned to be permitted to lay their case before the President in person. Removal agent Boutwell wrote to Ramsey from La Pointe that the Chippewa were "disputing every inch of ground – absolutely refusing to remove and strongly maintaining the right of soil – declaring they would encounter famine and death before they would relinquish their rights and go . . . "[224] Fearing the worst, Watrous wrote to Commissioner Lea requesting a company of infantry be sent to La Pointe.[225]

Faced with the scandal of Sandy Lake, the Chippewa protest over the behavior of Agent Watrous, the utter

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[223] NAM M234 R. 767:159-163. Feb. 10, 1851. A. Ramsey to J. Warms.

NAM M234 R. 168. May 25, 1851. J. Watrous to A. Ramsey. Enclosed with NAM M234 R. 767:159-163. Feb. 12, 1851. A. Ramsey to L. Lea.

NAM M234 R. 168. Dec. 12, 1851. J. Watrous to A. Ramsey.

ARCOIA 1852 Sept. 15, 1852.

ARCOIA Sept. 8, 1853. D. Herriman to W. Gorman.

Spates Papers Ms. MHS P1595. Aug. 7, 1854. S. Spates to Dear Brother.

[224] NAM M234 R. 168. September 18, 1851. A. Boutwell to A. Ramsey.

ABCFM Ba10.A512b. Aug. 13, 1851. L. Wheeler to S.B. Treat.

[225] NAM M842 R. 3:883-885. July 1, 1851. J. Watrous to L. Lea.

failure of the removal effort to date, the powerful opposition of the American Board of the Commission of Foreign Missions in Boston, the protest of Wisconsin and Michigan citizens and the prospects of an Indian war, Commissioner of Indian Affairs Luke Lea wrote to the Secretary of Interior Stuart on June 3, 1851 outlining the action which had been taken on Chippewa removal to date, and summarized the opposition against removal from the Indians and the local citizenry and the territory of Wisconsin. In part, Lea reported that:

> When the extent of the order became known, communication from sources of the highest consideration embracing petitions from the legislature of Wisconsin and citizens [unintelligible word] the ceded country; letters from the authorities of missionary establishments among the Chippewa of Lake Superior and other highly respectable individuals were received at this office remonstrating in strong terms against the application of the order to these Indians.
>
> In view of the weighty reasons in the communications referred to from ___ which it appears that the removal of the Anse, Vieux Desert, Ontonagon, Kewanenon, La Pointe and Bad River bands of Chippewa is not required by the interests of the citizens or Government of the United States and would in its consequences be disasterous to the Indians. I recommend that the order of the President be so modified as to permit such portions of these bands as may

desire it to remain for the present in the country they now occupy."[226]

On the 25th of August Acting Secretary Abraham (or Graham) wrote to Lea:

> As your request in your letter of 23 inst. You are authorized to instruct Agent Watrous to suspend the removal of the Chippeway Indians until the final determination of the President upon the subject of your letter of the 3rd June 1851 can be communicated to him.[227]

Lea immediately telegramed Watrous ordering him to suspent the removal.[228]

Ramsey and Watrous were undaunted by the suspension and paid no attention to it. During the winter of 1851-1852 they continued their planning and issued optimistic, but false reports on the success of their efforts to date.[229] Watrous even prepared a muster roll of removed Chippewa containing hundreds of names. In fact, few if any of these people actually removed and those who did ultimately returned home.[230] No Mille Lacs even

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[226] NAM M234 R. 6. June 3, 1851. L. Lea to Acting Secretary of Interior.

[227] MN 003394. Aug. 25, 1851. T. Abraham to L. Lea.

[228] NAM M21 R. 45. Aug. 25, 1851. L. Lea to J. Watrous.

[229] ARCOIA 1851 Sept. 20, 1851. J. Watrous to A. Ramsey.
NAM M234 R. 168. Dec. 26, 1851. A. Ramsey to COIA.

[230] NAM M234 R. 168. Sept. 20, 1851. J. Watrous to A. Ramsey.

appeared on the list.[231] Watrous continued to plan for a spring removal in 1852 but in the meantime increasing complaints were being raised against his personal conduct. The chiefs and others charged that Watrous deceived the Chippewa, favored the interests of traders, sold liquor to Indians and cohabited with Indian women.[232]

In late 1851 and in 1852, faced with mounting opposition to the removal effort as well as the suspension order, Ramsey and Watrous began to develop a more subtle approach to removal. Realizing that a great deal of pressure was coming from La Pointe including missionaries, traders and Chief Buffalo, Watrous apparently promised that he would recommend that a delegation of chiefs be permitted to visit Washington to lay their case before the President.[233] On December 26, 1851 Ramsey wrote to

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ABCFM Ba10.A512b. Box 6. Dec. 1, 1851. S. Hall to S. Treat.
ABCFM Ba10.A512b. Box 6. Mar. 8, 1852. S. Hall to S. Treat.
ABCFM Ba10.A512b. Box 6. May 1852. S. Hall to S. Treat.
ABCFM Ba10.A512b. Box 6. Nov. 20, 1852. L. Wheeler to S. Treat.
NAM M234 R. 150. Nov. 10, 1853. D. Herriman to W. Gorman.
NAM M234 R. 150. Nov. 15, 1853. C. Oaks to W. Gorman.

[231] MN 007726 Aug. 28, 1851. Removal Roster by J. Watrous.

[232] MN 007660 Jan. 31. 1852. Affidavit of John Bell.
MN 007350 Nov. 8, 1851. *Ahkewanlee* to Ramsey.
Alexander Ramsey Papers. Minnesota Historical Soc. M 203 R. 6. Dec. 9, 1851. H. Sibley to A. Ramsey.
MN 007665. Mar. 20, 1852. S. Hall to A. Ramsey.
___ Nov. 6, 1851. Buffalo to Lea.

[233] AR M203 R. 6. Sept. 25, 1851. J. Watrous to A. Ramsey.

Commissioner of Indian Affairs Luke Lea with some suggestions for removal during the following summer. In regard to those Indians still residing within the cessions, Ramsey concludes:

> Again in the instance of these Indians, no pressing necessity exists for their immediate removal, so far as the interests, rights, prejudices even of our citizens is concerned, who inhabit the lands which they have ceded, but continue to occupy. The influence of the American community resident upon the mineral lands of Lake Superior has at all times been adverse to the removal.[234]

Ramsey goes on to suggest that a small delegation of chiefs be permitted to visit Washington for the purpose of seeking a revocation of the removal order and the policy of making annuity payments only on unceded territory. He goes on to suggest some relaxation of current policy.

> There are reasons, to which for this place I will not advance(?) why it might be proper and just to permit this deviation for the rule of payment in the case of the La Pointe band. But it should be done through the [unintelligible word] of the agent and not by express promise of government.
>
> The rule should nominally continue in full force while the agent might have discretionary power to disregard it in this special circumstance.[235]

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[234] NAM M234 R. 168. M32 Dec. 26, 1851. A. Ramsey to L. Lea.

[235] NAM M234 R. 168. M32. Dec. 26, 1851. A. Ramsey to L. Lea.

In May of 1852 Ramsey wrote a confidential letter to La Pointe missionary Sherman Hall in which he laid out the plan he had proposed in December to Commissioner Luke Lea.

> I have one or twice, written the Indian Department to this effect, that as white men, Half-breeds and Indians on the shore of Lake Superior were adverse to the removal of the latter, it might be as well to indulge, at least for a time, the Bands at La Pointe, Bad River, Ontonogan and the Anse, and except them from the general order to remove.
>
> If I am not mistaken the bands above comprise about one thousand souls.
>
> To the other Chippewa, those on the Chippewa, Wisconsin, Lac du Flambeau, etc. etc. I would say, the payments in [sic] future will be made at Sandy Lake, and unless you remove, you cannot participate in the annuities of your tribe. Further than this, I think it advisable that the Government should not go in [on] urging a removal. The few bands remaining might be paid at La Pointe.
>
> But unless the Department at Washington should make an order in accordance with these views, under the instructions that the agent now acts, he can hereafter only pay goods and money to such as do remove.
>
> The La Pointe band can hereafter only be paid upon condition they do remove, unless, as I before said, an order excepting them should be received from Washington.

> I shall in all probability visit W. [Washington] in the month of May or June and will again urge these views upon the Government.[236]

These letters not only provide an outline of the new, more subtle removal approach but Ramsey's considerable political acumen. Not only was he co-opting the missionary opposition by selective enforcement of removal but in treating the lake shore bands differently, he was also adopting a divide and conquer approach. The isolated interior Wisconsin bands, without the support of missionaries or citizens, would still be forced to remove, while the possibility was held out that those on the Lake Superior shore would be paid at Fond du Lac or even La Pointe. By adopting the policy that he would only pay treaty annuities on unceded ground, Ramsey could accomplish his objective even if he did not remove a single Indian. Federal dollars would come to Minnesota with or without the Indians.

By early spring of 1852 the government had not decided if it would continue the removal attempt. Silas Treat, head of the American Board of the Commission of Foreign Missions lamented the cruelty of removal but found the government's vacillation troubling as well. Everyone in the Indian establishment found it difficult to plan for the future.[237] As Silas Treat wrote to fellow missionary Sherman Hall, "The truth is everything is

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[236] ABCFM Ba10.A512b. May 1852. S. Hall to S. Treat.

[237] STMN D30065. Feb. 3, 1852. S. Treat to S. Hall.
ABCFM Ba10.A512b. Mar. 8, 1852. S. Hall to S. Treat.
ABCFM Ba10.A512b. May 7, 1852. S. Treat to S. Hall.
ABCFM Ba10.A512b. Mar. 22, 1852. S. Hall to S. Treat.

uncertain in regard to the future of the Ojibwa. Last spring I *hoped* that your Indians [La Pointe] would be allowed to remain where they are. Subsequently I gave up hope and supposed that their removal was pretty certain. Now I am thrown back again. The Indian Department in this thing seems to resemble a flock of wild geese who have lost their way.[238]

During the winter of 1851-52 various Chippewa chiefs had petitioned for permission to go to Washington to argue their case to the President and Congress.[239] Watrous, with the support of Ramsey, promised the Chippewa he would recommend the approval of such a delegation. However, in June 1852 an unauthorized delegation under the leadership of *Pishake* (Buffalo), *Kisketuhug* and *Oshaga* with Benjamin Armstrong acting as interpreter and conductor left La Pointe for Washington. Several decades later Armstrong published an account of the trip and its results which is part of his personal reminiscences of frontier life.[240]

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[238] ABCFM Ba10.A512b. May 7, 1852. S. Treat to S. Hall.

[239] NAM M234R 168. M32. Dec. 26, 1851. A Ramsey to L. Lea.

[240] Armstrong, Benjamin G. 1892 *Early Life Among the Indians, Reminiscences of the life of Benj. G. Armstrong*. Ashland WI:Press of A.W. Bowron, P. 3-31.
Satz, Ronald N. 1991 *Chippewa Treaty Rights*, Eau Clair WI:Wisconsin Academy of Sciences, Arts, and Letters Transaction Vol. 79(1).
MN 003467. June 16, 1852. Lake Superior Miner's Journal.
NAM M21. R. 46. June 29, 1852. L. Lea to J. Watrous.

According to Armstrong, the Chippewa delegation eventually reached Washington by way of Boston and New York. After some difficulty they were finally able to see President Fillmore and Chief *Oshaga* made an eloquent case against removal. Sometime later according to Armstrong's account, the delegation was summoned to the White House where the President gave Buffalo a written instrument promising to end removal and reinstate annuity payments at La Pointe. They then returned to La Pointe and to the jubilation of the assembled Chippewa proclaimed an end to removal.

Although the removal order was ultimately repudiated and annuities paid at La Pointe in 1853, Armstrong's account contains substantial errors designed perhaps to glorify his own role. The cancellation order has never come to light. In addition, the subsequent action of field agents do not indicate that they received word of any cancellation order. Indeed, *Pishake* and *Oshaga* wrote to Governor Ramsey shortly after their return from Washington. In this letter they say that they had learned that Ramsey had the power to decide their fate and then urged him to let them remain as he had promised.

> My father, I have just returned from Washington I learned that you was the one that had to say, that we had to go or stay, if that is the case do as you said that you would do last winter when I visited you, you told me that if it was left for you to say you would do all that was in your power to have us stay at La Pointe it is left to you to say wither [sic] we will be permitted to remain or not we had just as leave die as to go

> west of the Mississippi River, I want you to write to me and let me no [sic] my destiny.[241]

In all likelihood if the *Pishake* delegation saw President Fillmore at all, he must have done little more than confirm Ramsey's authority. Since Ramsey had reassured Buffalo the previous winter that he would support his request to let the La Pointe band remain on Lake Superior, Buffalo may have believed that the objectives of the Washington visit had been satisfied. It is quite clear, however, that despite the presence of Watrous and quite possibly Ramsey himself in Washington that spring, the President did not rescind the stay which had been placed on the removal effort the previous August.

For the remainder of 1852, Ramsey and Watrous followed the passive approach he had recommended to the Commissioner of Indian Affairs in his letter of December 26, 1851. They decided to move the Chippewa agency from Sandy Lake to Crow Wing, refused to provide annuity services in ceded territory, and paid annuities at Fond du Lac which was the closest settlement on unceded territory.[242]

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[241] NAM M842 R. 4:754-55. July 25, 1852. Buffalo and *Oshaga* to A. Ramsey.

[242] NAM M234 R. 149:245. June 7, 1852. J. Watrous to L. Lea.
ABCFM Ba10.A512b. Box 6. Aug. 9, 1852. S. Hall to S. Treat.
ABCFM Ba10.A512b. Box 6. Aug. 9, 1852. A. Ramsey to ___.
ABCFM Ba10.A512b. Box 6. Oct 7, 1852. S. Hall to S. Treat.
ARCOIA 1852:327-336. Oct. 26, 1852. A. Ramsey to L. Lea.
ABCFM Ba10.A512b. Box 6. Nov. 9, 1852. S. Hall to S. Treat.
NAM M21 R. 46:239. Jan. 6, 1853. L. Lea to C. Stuart.

Ramsey also reneged on his promise to support the La Pointe or Buffalo's band in remaining on Lake Superior.[243] He did, however, use his discretionary power to exempt the Michigan Chippewa living at L'Anse from removal and agreed to pay their annuities at Keweenaw Bay.[244] The government had badly underestimated the tenacity of the Chippewa and also the sense of justice and fair play among the citizens of the region.[245] The Chippewa would simply not be moved.

Bad River missionary Leonard Wheeler reported as much in November of 1852.

> No one in the country needs to be told now the recent effort to remove the Indians is a failure. Mr. Hall has just returned from the Mississippi, and from him I cannot learn that a half dozen families have been removed. At the great farm [Crow Wing] where he is expected to go, which the agent [Watrous] has endeavored to render especially attractive, and where he has made great efforts to remove the people, brother Hall says there are about twenty families, mostly half breeds and Gull Lake Indians. The Indians in that region [Mississippi Chippewas]

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[243] NAM M842 R. 8. Aug. 10, 1852. A. Ramsey to Buffalo and *Oshaga*.

[244] ARCOIA 1852:327-336. Oct. 26, 1852. A. Ramsey to L. Lea.

[245] ABCFM Ba10.A512b. May 12, 1852. S. Treat to L. Lea.
MN 003467. June 16, 1852. Lake Superior Miner's Journal.
NAM M234 R. 149. June 30, 1852. Citizens Petition.
ABCFM Ba10.A512b. July 14, 1852. L. Wheeler to S. Treat.
ABCFM Ba10.A512b. Aug 30, 1852. S. Hall to S. Treat.

> he says, have been removed just as ours have on the Lake [i.e. not removed at all].[246]

Although Ramsey's efforts with the Chippewa were certainly a failure, he had more success in satisfying his state's merchants. The annual report to the Commissioner of Indian Affairs for 1852 notes that the Indian supply contracts had been moved from St. Louis to St. Paul.[247]

The Demise of Chippewa Removal.

When the new Democrat President Franklin Pierce took office in March 1853 the Whig party disintegrated. In the spring Willis Gorman replaced Alexander Ramsey as the Governor of the Minnesota Territory and soon thereafter John Watrous was removed from office and charged with malfeasance.[248] The attempt to remove the Wisconsin Chippewa came to an end; a failure from start to finish.

During the next two years the United States formally repudiated Chippewa removal and the attempted cancellation of hunting, fishing and gathering rights reserved under the 1837 and 1842 treaties. Agent Henry Gilbert a protege of new Commissioner of Indian Affairs George Manypenny, paid annuities at La Pointe in the fall of 1853 and wrote to Manypenny on his return to Detroit with a

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[246] ABCFM Ba10.A512b. Nov. 20, 1852. L. H. Wheeler to S.B. Trent.

[247] ARCOIA 1852:327-366. Oct. 26, 1852. A. Ramsey to L. Lea.

[248] MCT Dkt. Ex. 98. Oct. 27, 1853. L. Wheeler to Dear Father.

report. Removal, he said "was the great terror of their lives" and "that they would as soon submit to extermination than comply with it." Gilbert continued by saying that: "I deem it important not only that the policy of removal should be abandoned but that such a determination on the part of the United States should be communicated to them in an official form. They can then acquire lands and make settlements and improvements unmolested by the fear of being removed from their homes which has paralyzed them – and thwarted the labors and efforts of missionaries and teachers for several years.[249]

Minnesota Governor Gorman decided to pay annuities on the St. Croix in 1853. Like the La Pointe payment, this was also on ceded territory. This new turn of events overjoyed the Chippewa but particularly those at the St. Croix valley who were destitute and starving. Before provisioning them Gorman got their pledge to remove in the spring if "it was their Great Father's wish." In making the St. Croix payment Gorman was also looking ahead to a new treaty [1854] as he said, "I also felt that soon a treaty would have to be made with those Indians for the Lake Superior country and it was in my judgment highly expedient that all the ill founded prejudices growing out of past transactions [removal] should be dispelled if possible with a view to said treaty."[250]

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[249] MN 006442. Dec. 14, 1853. H. Gilbert to G. Manypenny.

[250] NAM M234 R. 150. Feb. 6, 1854. W. Gorman to G. Manypenny.

In his annual report for 1854 Manypenny also made the link between formal abandonment of removal and the new treaty which was concluded at La Pointe on September 30, 1854.

> There are, however, within the limits of Wisconsin, and also within the northern peninsula of Michigan, a few small bands of Chippewas of Lake Superior, who still occupy their former locations on lands ceded by treaties of 1837 and 1842. It has not, thus far, been found necessary or practical to remove them. They are very unwilling to relinquish their present residences as are all the other bands of the same Indians; and it may be necessary to permit them all to remain, in order to acquire a cession of a large tract of country they still own east of the Mississippi which on account of its great mineral resources, it is an object of material importance to obtain.[251]

Although the 1854 treaty and the new policy of settling Indians on reservations is discussed in Chapter 9, it is clear that as both a matter of policy and practice, removal was decisively ended in 1854. Article 11 of the 1854 treaty makes the end of removal explicit:

Article 11. "All annuity payments to the Chippewa of Lake Superior shall hereafter be made at L'Anse, La Pointe, Grand Portage, and on the St. Louis River; *and the Indians shall not be required to remove from the homes hereby set apart for them*. And such of them as reside in the territory hereby ceded shall have the right to hunt and

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[251] ARCOIA 1854:213.

fish therein, until otherwise ordered by the President."[252] (emphasis added).

Thus, by the fall of 1854 all of the Lake Superior Chippewa had received reservations in the territory ceded in 1837, 1842, and 1854, all could expect to be paid their annuities on or close to their reservations and all had the right to hunt, fish and gather on the territories which had been ceded. This last point was made clear by Governor Willis Gorman on February 16, 1855 when in reference to lands south of Mille Lacs lake which were ceded in 1837 he said that the Mille Lacs band had "no other treaty interest [there] except hunting and fishing . . . "[253] In June of 1855 Gorman repeated this statement in a letter to Little Hill warning him not to disturb a dam built by lumbermen on land ceded in 1837. Gorman told Little: Hill, "It is not on your land [1855 reservation at Mille Lacs] and if it was it was put there long before you had any rights there except to hunt and fish.[254]

Missionary Sherman Hall, a missionary to the Chippewa for 35 years and a person who was intimately involved in the removal campaign summed up the demise of the policy of removing the Chippewa residing "in the Lake Superior country as well as all those south of that." "Great efforts" he said "were made to effect their removal, but the sequel proved their attachment too strong for the particular locality of their birth to make it

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[252] Treaty of La Pointe 1854. 10 Stats 1109.

[253] NAM M234 R. 150:222. Feb. 16, 1855. W. Gorman to COIA.

[254] MN 008243. June 4, 1855. W. Gorman to Little Hill.

any easy matter and the policy was abandoned by the government."[255]

Chapter 8

The Mille Lacs Chippewa in the 1850's: A Rise to Prominence

Although the Mille Lacs region was part of the territory claimed by and assigned to the Chippewa in 1825 at the Treaty of Prairie du Chien, during the 1830's this territory was also contested by the Dakota and was the scene of raids and counter-raids by the Chippewa and Dakota. In the early 1840's the Chippewa-Dakota contested zone passed to the west making Mille Lacs safe for missionaries and traders.[256] It was also at that time, however, that lumber men began to push up the Rum and St. Croix rivers from the south.

In the early 1840's Mille Lacs was the home of three Chippewa bands under the leadership of *Washaskkokone* (Rat's Liver), *Naqwanabe* (Feather End), and *Wahtap*. Together they numbered about 300 people.[257] By 1847 the Rum River band of about 60 people under *Nodin* (The Wind) moved permanently to Mille Lacs. The chiefs of bands in 1850 were *Naqwanabe* (Feather end), *Pedud* (Rat's Liver), *Mukkoda* (Bear), and *Kitchi Nodin* (Great Wind). In

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[255] *Sauk Rapids Frontiersman*. April 18, 1858. Report of a lecture by Sherman Hall.

[256] ABCFM MsBa10.A512b. March 8, 1843. W. Boutwell to D. Greene.

[257] Minnesota Historical Society M390 R. 1, n.d. 1849. Annuity Roll.

1851 bands led by *Mahnomenekayshe* (Rice Maker), and *Shagobi* (Little Six) from the Snake River moved to Mille Lacs raising the total Mille Lacs population to at least 400 people.[258] It seems likely that *Pedud* or *Petud-dunce* was the successor to *Washashkokone* whose name literally meant muskrat or rat's liver. *Petud* also apparently translated his name that way but it is likely that he simply adopted the name Rat's Liver as a clan chief name. It would also seem that *Nodin* became *Kitchi Nodin* after moving to Mille Lacs, a name perhaps more befitting his great stature among the Chippewa as a speaker. *Naqwanabe* was, however, clearly the most visible of the Mille Lacs chiefs. By 1855 the number of bands gathered at Mille Lacs had increased to eight and population had climbed to over 700 people.[259]

The reason for the increased population and the rise of the Mille Lacs bands to greater political prominence was partially the result of the fact that Mille Lacs became a refuge for displaced bands of Chippewa from the region to the south and east. These groups moved to the Mille Lacs where they could be accommodated because of the abundance of fish and rice. Mille Lacs lake, though large, is relatively shallow and a very productive lake which provides fish of several species including tullibee, a small whitefish, which were taken in large quantities in the fall with gill nets. One of the most remarkable of Mille Lacs' resources is wild rice which is abundant in Whitefish,

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[258] NAM M234 R. 168 M32. Dec. 15, 1851. J. Watrous to A. Ramsey.

[259] Minnesota Historical Society M 390. R. 3, n.d. 1855. Annuity Roll.

Shakopee and Onamia lakes. These shallow waterbodies lie just south and east of Mille Lacs lake on the outflow into the Rum River. Ideal rice habitat, these lakes produced prodigious quantities of rice in most years. Likewise, large and small game and waterfowl were abundant in the hill and swale country which bordered the lake on all sides.

Naqwanabe died in January of 1855 throwing the leadership into some confusion.[260] At the time the eight Mille Lacs bands were led by *Pedud, Mahnomenkayshe, Kayqwadaush* (the Attempter), *Mukkoda, Shooneyahe, Kaykake, Petahwegezhik* and *Nawdenah*. The latter was *Naqwanabe's* band and by late February 1855 it was under the leadership of *Shobaushkum* (He That Passes Through) who became one of the most important chiefs in Mille Lacs history.

By the spring of 1851 the lumber frontier had reached Mille Lac.[261] This contact had two immediate impacts. First, the introduction of alcohol led to violence and misery among the Chippewa and secondly, the lumber men provided a ready market for foods and other goods produced by the Chippewa. It was, in fact, because of the liquor problem that Mille Lacs lake did not become a destination point for Chippewa removed from Wisconsin. Although recognized as a region which could support a large population because of the abundance of rice and fish, removal agent Watrous believed it better to remove

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[260] Spates Papers P1595. Minnesota Historical Society. Feb. 5, 1855. S. Spates to Elder Brooks.

[261] NAM M234 R. 168. May 25, 1851. J. Watrous to A. Ramsey.

the Wisconsin Chippewa farther west beyond the Mississippi River where they would be less exposed to alcohol and from which it would be more difficult for them to return home.[262]

To obtain items of American manufacture, the Mille Lacs traded and sold sugar, rice, fish, fowl, cranberries, blueberries and venison to the lumber camps.[263] Thousands of barrels of wild rice was marketed each year along with maple sugar which sold for 5 cents per pound.[264] In 1855 it was estimated that the Mille Lacs made between three and five thousand bushels of rice worth 4 to 5 dollars per bushel.[265]

Other impacts on the Mille Lacs bands included a new road cut along the Rum River in 1855-1856. Much of the work was done by Chippewa, who through this project had their first exposure to wage labor.[266] The road also provided easier access to the lake from the south but despite this fact in 1861 the Mille Lacs complained that they were forced to carry their annuity goods home on their backs from Crow Wing, which was a forty mile trip through the snow.[267]

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[262] NAM M234 R. 168. May 25, 1851. J. Watrous to A. Ramsey.

[263] *St. Anthony Express*. Vol. 1, No. 36. Jan. 31. 1852.

[264] *St. Paul Minnesotan* Vol. 1, No. 21, Feb. 7, 1852.

[265] ARCOIA 1855.

[266] NAM M234 R. 151. Nov. 10, 1855. W. McAboy to G. Manypenny.

[267] NAM M234 R. 151:269. n.d. 1861. *Shobaushkum et al.* to President.

During the 1850's and the 1860's traders continued to reside at Mille Lacs or at least to visit the lake on a regular basis. In the late 1840's *metis* merchants like Joseph Ballanger lived at Mille Lacs and in the early 1860's the government licensed William Stevens to trade there.[268] In most cases goods were advanced on credit against future return of fur, rice, sugar or other marketable commodities which the Mille Lacs Chippewa produced for the American market. The net result of the trading enterprise was that Indians fell gradually into debt to the traders.

Missionary activity aimed at convincing the Mille Lacs to convert to Christianity was notably unsuccessful as it was in general among the Chippewa of the mid-nineteenth century. The nearest mission to Mille Lac was located at Lake Pokegama on the Snake River where in 1846 missionary Sherman Hall reported that the congregation had 10 Chippewa members – of which 7 were backsliders.[269] From time to time converted Chippewa preachers like John Johnston also known as *Enmegahbowh* visited Mille Lacs but none seems to have had success. The Mille Lacs remained a traditional people.

Likewise, early attempts to encourage the Mille Lacs to farm the heavily timbered land around the lake was not successful. A government farm was slated for Mille

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[268] MN 006408. Sept. 15, 1845. J.P. Hayes to H. Dodge.

Minnesota Historical Society A-L 958. June 12, 1855. Lumberman's Diary.

NAM M234 R. 152:285. May 31, 1861. C. Thompson to W. Dole.

[269] STMN D30031. May 2, 1846. S. Hall and W. Boutwell to D. Greene.

Lacs in 1851. In 1853 he cleared and planted 30 acres in that year and seemed to have produced a good crop.[270] Again, in 1854 at the behest of missionaries the Mille Lacs people planted six or eight gardens mostly containing potatoes. Anxious for government help in farming, as promised in the 1855 Treaty, many Mille Lacs Chippewa became first time extensive gardeners in 1856. Unfortunately, grasshoppers almost totally destroyed their corn crop that year.[271] Serious efforts were never make to help the Mille Lacs produce food by agriculture. The Mille Lacs continued to hunt, fish, trap, and gather wild plants to support their families and to trade for manufactured goods. In short, they lived much as they had for centuries.

In her study of Ojibwa factionalism and resistance, Rebecca Kugel points out that the Ojibwa strategy of seeking to accommodate American interests which held sway during the first half of the nineteenth century began to collapse during the 1850's. The Chippewa were becoming increasingly aggressive and militaristic as the war chiefs began to convince more and more people that new tactics were necessary to counter American influence.[272] In fact, it was clear to many Ojibwa that the United States

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[270] ARCOIA 1853.

NAM M842 R. 3:637-642. Feb. 28, 1851. J. Watrous to A. Ramsey.

[271] Spates Papers P1595. Minnesota Historical Society. Aug. 7, 1854. S. Spates to Dear Brother. NAM M234 R. 151:103. Aug. 30, 1856. W. McAboy to G. Manypenny.

[272] Kugal, Rebecca 1986 To Go About on the Earth: An Ethnohistory of the Minnesota Ojibwe: 1830-1900. Unpublished PhD dissertation, Univ. of Calif-Los Angeles, p, 164.

was itself becoming much more aggressive and demanding.

The new Ojibwa policies were in part the result of the removal debacle, changes in function and style of Ojibwa leaders and the consolidation of the U.S.-Canadian border. Stabilization of the border took away the old Ojibwa strategy of using the threat of alliance with Britain and the Hudson Bay Company as a foil to obtain favorable consideration from the United States.[273]

After the death of Hole in the Day the Elder in 1847, his son also known as Hole in the Day, though a young man, claimed leadership of the Gull Lake band. This event was unusual since he was qualified by neither age or experience for this position and because his brash actions and willingness to act unilaterally were contrary to well established patterns of Ojibwa politics. Although many Chippewa chiefs resented his actions and the degree of personal decision making he exercised, Hole in the Day was admired by Americans for these same qualities. Within the traditional system Hole in the Day functioned as a war chief which did in fact permit a greater degree of individual action. At any rate Hole in the Day did maintain much popular support, particularly among the Gull Lake bands, until he was assassinated in June of 1868.[274]

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[273] NAM M234 R. 389. Sept. 10, 1847. H. Rice to W. Medill. Bray, Martha (ed) 1970 *The Journals of Joseph Nicollet*. St. Paul: Minnesota Historical Society pp. 81-84.

[274] Diedrich, Mark 1986 *The Chiefs Hole in the Day of the Mississippi Chippewa*. St. Louis Park MN: Coyote Books. p. 46-48.

Hole in the Day's rise to a position of leadership and influence was part of a pattern of larger change. With the cooling of hostility between the Dakota and the Chippewa, and with the advent of American settlement in the 1840's, war chiefs began to lose influence. This was also in part due to the decline in fur market which not only increased the importance of annuities but also enhanced the position of civil chiefs who were able to secure more annuities by consolidating their followers and accommodating American demands. In this situation the government tried to manipulate Ojibwa politics by channeling treaty stipulated goods and services to "cooperative" chiefs. The result was that those chiefs who could acquire more goods for their people built their prestige. The variable which was different was not the principle upon which prestige rested but the source of the goods, that is, the United States. Thus, both war and civil chiefs could enhance their own position by manipulating the U.S. government. Some like Hole in the Day ultimately used violence or threats of violence and others like *Shobaushkum* at Mille Lacs used quiet diplomacy.

As Kugel points out, Chippewa politics was transformed because it was factionalized between aggressive and passive strategies. In the 1850's the bands based at Mille Lacs and particularly those under the leadership of *Shobaushkum, Pedude* and *Mahnomenkayshe* advocated diplomacy in dealing with the Americans while the Gull Lake, Pillager and more northern Chippewa adopted an increasingly hostile approach.

The mid 1850's was one of tremendous trauma for the Minnesota Chippewa. In 1854 and 1855 they agreed to treaties by which they ceded a major portion of their

tribal land holdings in favor of permanent reservations. In the case of the Mille Lacs Chippewa, they were also forced to contend with the encroachment of lumber men on or close to the boundaries of their reservation.

These latter events had the unfortunate effect of distracting the Mille Lacs chiefs at a very critical time in their relationship with the United States. They do, however, give us a view of the practical relationship between powerful lumber interest, Minnesota territorial officials, the federal establishment and the Mille Lacs Chippewa. At stake was the right of the Mille Lacs to harvest wild rice which was critical for both their subsistence and commerce.

The harvest of pine timber in the Great Lakes region was done by floating logs down streams and rivers to centralized saw mills. In the upper reaches of drainage systems this often entailed construction of holding dams in order to build a sufficient head of water to flush the logs downstream. In Wisconsin and Minnesota these dams played havoc with Indian rice marshes because pronounced fluctuations of water levels upstream would uproot young rice plants and ruin the crop. As early as 1843 the Chippewa responded to this threat by destroying dams on the Snake and Rum Rivers.[275]

In 1849 lumber men constructed a dam near the source of Rum River at Mille Lacs lake. This dam backed water over one of the Chippewa's most important rice beds and became a focus of conflict between the Mille

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[275] MN 007270. Jan. 28, 1847. W.T. Boutwell to Whom It May Concern.

Lacs and their lumber men neighbors. During the spring of 1854 Indians lifted the gates of the dam to lower water levels and also threatened to tear out the dam entirely. Minnesota Governor Willis Gorman was forced to send an emissary to Mille Lacs to negotiate the dispute – an action which was unsuccessful.[276]

While the Mille Lacs chiefs were in Washington for negotiation of the Treaty of 1855, word was received at Ft. Snelling that two lumber men had been killed in a dispute between some Mille Lacs people and the workers of the Day Lumber camp on the upper Rum River. Lieutenant J. Hamilton of the 3rd Infantry was dispatched to Mille Lacs with 25 soldiers to arrest the guilty Indians. According to Hamilton's report, a small group of intoxicated Indians appeared at the camp on February 10 demanding food and liquor. After several hours of threatening, punctuated by pushing, punching, and banishing weapons, two teenage boys indeed shot and killed two lumber men and one of the Indians was killed in the ensuing gunfire. In order to peacefully procure his prisoners, Lt. Hamilton met the Mille Lacs in council. It became apparent in these talks that the Mille Lacs were very upset by two points. First, the flow of liquor into their community which was supposed to be stopped by the United States but was not and secondly, the destruction of the wild rice crops by the lumber dams. This last problem had been simmering for several years and was particularly serious for the Chippewa as they depended on rice for both their own subsistence as well as a trade

[276] NAM M234 R. 150:98. July 6, 1854. W. Gorman to G. Mannypenny.

commodity necessary to acquire American goods. Ironically the lumber men agreed with the Mille Lacs that the destruction of the rice violated a treaty guarantee.[277] In the preceding year, Governor Gorman had negotiated a temporary arrangement for the dam to be used during a time it would not harm the rice. Now, Lt. Hamilton negotiated the continuation of this arrangement until the chiefs returned from Washington and could again take up the issue. Lt. Hamilton reported this decision:

> In exchange for this loose arrangement I would say that I had no copy of the treaty [1837 St. Peters] with me – that many lumber men thought that the treaty insured protection to their rice crops – that all the Indians so understood it, and last and most powerful was the reason that this has been an unsettling matter for five years, during which time from five to ten opportunities have transpired for settling it and the neglect of which is much complained of by proprietors [lumber men] along the river – I did not feel justified in forcing from the Indians a right they had never ceded.[278]

Although the land at the head of the Rum River and south end of Mille Lacs lake was surveyed in 1851, there was still confusion about the location of the northern line of the 1837 cession. As near as it might be reconstructed, the dam in question was probably on the Rum at Onamia and would have thus raised water levels on Onamia and

[277] NAM M234 R. 150:262. June 1855. W. Garland to W. Gorman Citizens Petition.

[278] MNSA Governor's Archives, Letters Received. March 9, 1855. Lt. J. Hamilton to Lt. J. Stewart. Report of an Expedition to Mille Lacs.

Shakopee Lakes. This meant that the dam was clearly on the territory ceded in 1837. Likewise, the Mille Lacs were living on ceded territory since they were not to acquire a reservation until after ratification of the Feb. 22, 1855 treaty.

On February 16, Governor Gorman wrote Commissioner Manypenny a letter which is very important for our understanding of the rights guaranteed to the Mille Lacs under the 1837 Treaty. Still concerned with the dispute, Gorman dispatched a personal representative and interpreter to Mille Lacs to try to deal with the problem by meeting with the headmen. As he reported to Manypenny:

> If my messenger and interpreter should fail to reconcile them by such means [presents], I may have to resort to placing troops by the lumber men's camps to protect them in their lawful occupation. The lands occupied by the timber men have been surveyed and sold by the United States and the Indians have no other treaty interests except *hunting and fishing and* I do not think their land extends to the point at which our citizens are operating in the pineries, at least I am informed by the oldest citizens most familiar with the lines separating the Indian country from the ceded lands that our citizens are seven miles south of the extreme southern line of the Indian boundary. (emphasis added)[279]

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[279] NAM M234 R. 150:222. Feb. 16, 1855. W. Gorman to G. Manypenny.

Although it is not known exactly where the dam was located, Gorman's letter makes it clear that it was located at least seven miles south of the 1837 cession line which ran across the northern part of Mille Lacs lake. On today's maps a distance of twelve to fifteen miles seems more reasonable. In any case, Gorman's reference could only be to the line which separated the 1837 cession from unceded land north that remained "Indian country". Gorman's point, however, was that the Mille Lacs were occupying ceded lands. He goes on, however, to observe that the Chippewa had no propriety treaty rights on this land "except hunting and fishing." In this statement he makes clear reference to the usufruct rights reserved under the treaty of 1837.

Thus, in 1855 some years after the failed removal effort and before the consummation of the 1855 Treaty, at least the local lumber men, the Mille Lacs Chippewa and Governor Gorman, *ex officio* Superintendent of Indian Affairs for the Minnesota territory, believed that the rights to hunt, fish and gather which the Mille Lacs and other Chippewa reserved in the treaty of 1837 remained in force and undiminished by any subsequent events.[280]

In May and June of 1855 various lumbering interests claimed the dam was located on ceded territory.[281] Governor Gorman and the chiefs admitted that this was the

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[280] MN 008243 June 4, 1855. W. Gorman to Little Hill

[281] NAM M234 R. 150:243, May 29, 1855. D. Morrison et al to Governor of Minnesota.
NAM M234 R. 150:262. June 1855. W. Garland to W. Gorman.

case but contended that the dam flooded the rice crop on the newly created Mille Lacs reservation.[282]

Ultimately Governor Gorman negotiated a crop damage agreement whereby the lumber men would pay the Mille Lacs Chippewa 1,000 dollars per year for five years.[283] Henry Rice, representing the lumber men, contested this agreement saying the United States should pay the damages but this argument was soundly rejected by Secretary of the Interior McClelland who ruled that the dam owners were responsible.[284]

The decade of the 1850's was a traumatic one for the Mille Lac people, aggression by lumber men and whiskey dealers, the beginning of transformation in economy, crisis in political leadership, and major controversies about the treaty relationship between the tribe and the United States marked the era.

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[282] NAM M234 R. 150:242. June 4, 1855. W. Gorman to Commissioner of Indian Affairs.

NAM M234 R. 150:268. June 20, 1855. *Naubenawb et al.* to G. Manypenny.

[283] NAM M234 R. 150:268. June 20, 1855. *Naubenawb et al.* to G. Manypenny.

[284] NAM M234 R. 150:266. June 28, 1855. H. Rice to G. Manypenny.

NAM M234 R. 150:201-203. July 2, 1855. R. McClelland to C. Mix.

NAM M234 R. 150:194-195. July 13, 1855. R. McClelland to C. Mix.

Chapter 9

The Reservation Policy and the Treaty of La Pointe – 1854

Manypenny's Reservation Policy.

From the early years of the Republic until relatively recent times, it has been the central objective of American Indian policy to assimilate Native Americans into the mainstream of American social and political life. The history of Indian policy is largely the history of various philosophies and techniques used to attain this basic objective.

During the years of the first colonization of the trans-Allegheny west and in the years shortly before and after the War of 1812, influential American leaders believed that pacification must proceed civilization and that civilization was an antecedent to assimilation.[285] Government policy was thus based upon convincing the Indians to forsake traditional beliefs and lifeways in favor of Christianity, the English language, "civilized habits", the value of productive work, private property and subsistence by plow agriculture. Early attempts at instilling these practices in the Indians were largely unsuccessful, leading the

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[285] Prucha, Paul, 1969 *The Sword of the Republic.* Lincoln: The University of Nebraska Press.

Prucha, Paul, 1984 *The Great Father:The United States Government and the American Indians.* Lincoln:The University of Nebraska Press.

Bolt, Christine, 1987, *American Indian Policy and American Reform.* London: Univin Hyman Ltd.

Viola, Herman, 1974, *Thomas L. McKenney Architect of America's Early Indian Policy:1816-1830.* Chicago:The Swallow Press.

government to blame interference by unprincipled whites and whiskey sellers as the chief causes for the failure of Indians to see the wisdom of the wholesale adoption of civilized ways. To remove this adverse influence, missionaries and Indian agents along with liberal thinkers urged the formation of Indian colonies west of the Mississippi where Indians could be concentrated and protected while they were being civilized.[286]

The Indian Removal Act of 1830 established a mechanism for removal of eastern Indians. During the administration of Andrew Jackson from 1828 to 1836, most Indians were removed from the southeast and the central midwest to what was to become the Kansas or Nebraska territory. The government also contemplated that the more northern tribes, – in particular the Chippewa of Michigan and Wisconsin – might be moved north and west to unceded lands in Wisconsin and Minnesota. That plan failed because the prospective homelands in Wisconsin were ceded by the Chippewa of Lake Superior and the Mississippi in 1837.[287]

By the early 1840's it was clear that the removal policy was producing only mixed results. Although it provided the federal government with vast amounts of new land, it also created problems. Emigrating Indians were in conflict with both resident tribes and with white settlers who were already populating the western plains.

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[286] McCoy, Isaac, 1970, *History of Baptist Indian Missions*. New York: Johnson Reprint Corp.

[287] NAM M21 R. 22:364-365. Oct. 2, 1837, C.A. Harris to H. Schoolcraft.

Worst of all, Indians were making little progress in learning the skills of civilization. Certainly they were no closer to being able to assimilate into American society. Many whites blamed the lack of progress on the Indians themselves; it was said that "the savage mind was incapable of adopting civilized pursuits."[288]

There were, however, a few progressive reformers, such as Charles Mix, a longtime clerk for the Indian Department, and Hartley Crawford, Commissioner of Indian Affairs from 1838 to 1845. Both men believed that the failure of removal was due more to government policy than to any inherent characteristic of Indian psychology or culture.[289]

By the early 1850's a bold, new Indian policy emerged which was based on the idea that Indians could be collected on reservations in their home territories where they would be taught the skills of civilization. Charles Mix and George Manypenny, Commissioner of Indian Affairs from 1853 to 1857, were its chief architects.The new policy was embodied in varying degrees, in the fifty-two treaties Manypenny promoted during his tenure as Commissioner. Although Manypenny's treaties dealt with substantially different kinds of problems, they also showed remarkable similarity in philosophy, as well as in format and phraseology. Manypenny treaties were

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[288] Cleland, Charles E, 1992, *The Rites of Conquest: The History and Cultures of Michigan's Native Americans*. Ann Arbor: University of Michigan Press.

[289] Prucha, Paul, 1984, *The Great Father: The United States Government and the American Indians*. Lincoln: The University of Nebraska Press, p. 106.

often innovative and experimental, showing over time evolution of method to achieve core objectives.

As a reformer, Manypenny believed the assimilation goal could be achieved by education. Indians, in his view, were fully capable of learning, and he believed they could be prepared rather quickly for life in civilized society. To accomplish this it was necessary to teach them English, mathematics, domestic skills, modern agriculture and husbandry, the value of toil, thrift, private property and the Christian faith – preferably of a Protestant denomination. Manypenny knew that these and other values of civilized life were not part of Native tradition and he knew that everyday life on the American frontier offered powerful competition to his civilization objectives. Illicit traders cheated Indians and made prostitutes of Indian women. Real estate sharks had dozens of schemes to separate Indians from their land and whiskey peddlers were quick to addict Indians and take advantage of their desire for alcohol.[290] Given these conditions, Manypenny believed that Indians must be vigorously protected during the period they were learning to fend for themselves.

Simply stated Manypenny's objectives were as follows:

1. Concentrate Indians by reducing their land base and settling them upon reservations. Reservations provided a means to protect Indians and to efficiencly provide services at the same time.

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[290] ARCOIA 1855.

2. Consolidate money payments due under former treaties and sort out conflicting land claims. This would not only simplify the relationship between the government and each tribe but also make it easier to focus all money resources on the education and civilization process.

3. Provide instruction through a few teachers, farmers and missionaries and services of doctors, blacksmiths, mechanics and millers who were permitted on reservations for these purposes under the watchful eye of the resident agent.

4. Demonstrate the benefit of private property and labor by allotting to each Indian family land that would become their own secure holding as individuals; and

5. Encourage the role of Indians as potential citizens of their states and territories.

Prior to his appointment as Commissioner of Indian Affairs in 1853 George Manypenny was an Ohio businessman and politician who owed his appointment to political patronage in the Franklin Pierce administration.[291] Although a skilled businessman and administrator he knew nothing of Indians or Indian culture when he assumed office. While most Indian leaders with whom he negotiated appreciated the need for change, most also resisted being "civilized." They hoped to survive by accommodation rather than by ethnocide. Manypenny took a very businesslike approach and seldom seemed to

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[291] Kvasnicka, R. and H. Viola (eds), 1979, *The Commissioners of Indian Affairs, 1824-1977*. Lincoln: The University of Nebraska Press, p. 57-67.

have negotiated any more than absolutely necessary. This approach can be seen by contrasting the treaties he negotiated with relatively acculturated groups such as the Delaware, Shawnee or Choctaw as opposed to those written with the Chippewa or the northwest coast tribes.[292] In the former case the treaties read like long and complex contracts with every contingency spelled out, while in the latter cases much of the wording is somewhat standardized with few specific provisions. Clearly the less sophisticated groups were more trusting of the integrity of the United States and accepted the treaties with little opposition.

By the 1850's, many of the eastern tribes were quite sophisticated in keeping track of claims due under former treaties. The Michigan Chippewa, for example, claimed lands in the west promised by the government but to which they did not remove. Likewise the Indians were often aware of the schedule for the payment of annuities under former treaties which sometimes called for the United States to pay in perpetuity. Manypenny was concerned about these obligations and as a businessman saw the advantage of consolidating money claims in subsequent treaties.

Most of the treaties which Manypenny personally negotiated were held in Washington. Federal authorities fully appreciated the great advantage it held by controlling the number of Indian negotiators and isolating the

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[292] Treaty with Delawares-1854 10 Stats 1048.
Treaty with the Shawnee-1854 10 Stats 1053.
Treaty with the Choctaw and Chickasaw-1855 11 Stats 611.

chiefs from the advice of families and local influence.[293] Likewise, tribal delegations could be impressed with the affluence and power of the Great Father and the numbers and accomplishments of non-Indians. Manypenny learned this lesson early when he sent Henry Gilbert to La Pointe on Lake Superior in 1854 to negotiate with the Chippewa. Thousands of Indians appeared, creating an expensive provisioning problem not to mention controversy among Indian factions and pressure from special interest groups. For this reason Manypenny seldom left Washington to negotiate.

Manypenny often negotiated treaties in rapid fire order. For example, between May 6 and June 5, 1854 he personally negotiated seven treaties and during a ten day period in the summer of 1855 he concluded three Michigan treaties. One reason treaties could be arranged so quickly is that the form and language of many provisions of Manypenny's treaties are nearly identical. This observation also extends to many of the treaties negotiated by other treaty commissioners working under Manypenny's supervision during his tenure as Commissioner. Given the rapidity with which treaties were sometimes negotiated raises the question of how much actual negotiation took place. In many cases it appears that Indians simply accepted the substance and language as it was presented. In fact, it is often doubtful if they comprehended the terminology and concepts involved given the cultural and linguistic barriers which separated Nineteenth century Americans from Native peoples.

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[293] NAM M234 R. 150:151 Dec. 17, 1854 H. Rice to G. Manypenny.

The new reservation policy was a relief to the Chippewa who occupied the 1837 and 1842 cessions. Before, during, and after the attempts by the United States to remove the Michigan and Wisconsin Chippewa to Minnesota, they had been clamoring for permanent homelands within their old band territories. Such reservations would also offer some protection from the aggressive behavior of their non-Indian neighbors.

The La Point [sic] Treaty

Two major factors led to the 1854 treaty of La Pointe: the mutual desires of both the United States and the Chippewa to set aside land for reservations and the fact that the United States was extremely anxious to acquire the rich mineral deposits west of Lake Superior. With the departure of Alexander Ramsey in April 1853 and the removal and arrest of Agent Watrous in October, the stage was set for change. The new Minnesota Governor Willis Gorman, Commissioner of Indian Affairs George Manypenny and Superintendent of the Michigan Agency Henry Gilbert were a new team with new ideas and objectives in managing Indian affairs.

It was, of course, a long standing policy of the United States to purchase as much Indian land east of the Mississippi River as possible. By 1853 all but small portions of Michigan and Wisconsin had been purchased but the whole northern half of Minnesota remained Indian country. Previously, in 1847 when the Commissioners were appointed to negotiate for a cession to accommodate immigrating Winnebago, they were also instructed to try to buy the northeastern mineral district of Minnesota.

When the Lake Superior Chippewa put up strong resistance to the purchase offer, this objective was dropped from further consideration.[294] In 1851 reports of trespass on Indian lands west of Lake Superior by American mineral prospectors again prompted talk of purchase. In 1854 Congress considered a bill to authorize a treaty purchasing all remaining Indian land in Minnesota and Wisconsin.[295] The Wisconsin provision was the result of a surveying discrepancy along the western boundary line of the 1842 cessions which ran from the upper St. Croix River to the American Fur trading post on the St. Louis River. This line also formed the boundary between the State of Wisconsin and the Minnesota Territory. When Wisconsin entered the union in 1848 it was discovered that a surveying error left a three-quarter mile-wide strip in Wisconsin west of the cession line unceded. In February of 1854 the Wisconsin legislature memorialized Congress to acquire this strip for the benefit of the State.[296] Although the U.S. Senate voted the Minnesota land acquisition bill down in the summer of 1854, it was reintroduced and passed in December.[297]

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[294] NAM M234 R. 46, Aug. 2, 1847. I. Verplank to W. Medill.

[295] ARCOIA Nov 27, 1854.

NAM M21 R. 49:446-447. Aug. 11, 1854. G. Manypenny to H. Gilbert.

[296] Memorial No. 10, of the Legislature of Wisconsin Memorial and Resolutions. Feb. 27, 1854. Madison: David Atwood Printer, p. 158-159.

[297] Congressional Globe Dec. 13, 1854. (33 Congress, 2nd Session), Ch. 6, 7, pp. 598-599.

In the meantime, Commissioner Manypenny apparently decided to use the authority given by Congress in 1847 to try to purchase the mineral district. In August of 1854 he sent a series of treaty instructions to Agents David Harriman at Crow Wing and Henry Gilbert at Detroit who were appointed commissioners for the treaty. They were to attempt to negotiate the cession during the fall annuity payment at La Pointe. Manypenny, perhaps in anticipation of passage of the reintroduced Minnesota land cession bill, instructed Gilbert and Herriman to purchase all the land owned by the Lake Superior and Mississippi Chippewa in "the Territory of Minnesota, the State of Wisconsin or elsewhere."[298]

Manypenny knew that the purchase would be a hard sell. In his annual report for 1854 he wrote that the Chippewa who occupied the 1837 and 1842 cessions were "very unwilling to relinquish their present residences" and that it would be "necessary to permit them all to remain in order to acquire a cession of a large tract of country they still own[ed] east of the Mississippi which on account of its great mineral resources, [was] an object of material importance to obtain."[299] Thus it was clear to Manypenny that the *quid pro quo* by which the United States could obtain the fabulously rich iron deposits later to be known as the Mesabi and Vermilion iron ranges, would be the formal repudiation of the removal policy. The new treaty was to provide land reservations for the

[298] NAM M21 R. 49:446-447. Aug. 11, 1854. G. Manypenny to H. Gilbert.

[299] ARCOIA 1854. pp. 212-213.

Lake Superior Mississippi Chippewa and to confirm associated rights to hunt, fish and gather on the territory ceded.

Beyond policy, Manypenny was also aware of difficult political problems. The long history of complaints by *Naqwanabe, Kitchi Nodin, Shingob,* and other chiefs of the Chippewa who were parties to the 1837, 1842, and particularly the 1847 treaties indicated a severe disagreement between the Lake Superior and Mississippi Chippewa. In his instructions to Herriman and Gilbert he suggested a scheme to try to cover up the schism.

Manypenny suggested that they negotiate for the cession with the Lake Superior Chippewa and only involve the Chippewa of the Mississippi after the fact to leave the impression "that their presence is necessary in order that a better understanding may exist as to a proper disposition of the present annuities between the Lake bands and those on the Mississippi."[300] Manypenny suspected that the old fiction of one united Chippewa tribe with common interests was about to unravel.

In the instructions, Manypenny sent a map of the Chippewa country copy of the Otto Missouri treaty to use as a model for lotments, and a copy of the instructions for the suggested 1847 treaties. In a follow-up letter Manypenny even sent Gilbert and Herriman instructions on how to deal with blacksmith services. Since reservations were to be created by the new treaty, Manypenny

[300] NAM M21 R. 49:446-447. Aug. 11, 1854. G. Manypenny to H. Gilbert.

knew that some of the blacksmith shops and farms provided in localities handy for the common use of bands who were parties to the 1837 and 1842 treaties would no longer be strategically placed. He therefore suggested that the new treaty alter the obligations of the United States under the Treaties of St. Peters and La Pointe to provide these same services on the new reservations within the ceded lands.[301] Together these letters give evidence that George Manypenny was keenly aware of the nuance and detail of the Chippewa relations and the proposed treaty. Clearly, he was specifically proposing extinguishment of title to lands owned and claimed by the Chippewa in exchange for the permanent settlement of the Chippewa within their traditional territories. He made no suggestion as to the relinquishment of hunting, fishing and gathering rights.

As it turned out, the La Pointe treaty negotiation was a near fiasco. Over four thousand Indians representing both the Lake Superior and Mississippi divisions appeared along with contingents of tracers and mixed bloods, all intent on influencing the treaty to their favor. Gilbert later reported that "much jealousy and ill feeling existed between the [Chippewa of the Mississippi] and the Lake Superior Indians and they could not even be prevailed upon to meet each other in council."[302]

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[301] NAM M21 R. 49:446-447. Aug. 12, 1854. G. Manypenny to H. Gilbert.

MCT Def. Ex. 18. Aug. 14, 1854. G. Manypenny to H. Gilbert.

[302] NAM T494 R. 5:133-139. Oct. 17, 1854. H. Gilbert to G. Manypenny.

The standoff was ultimately solved by Gilbert who negotiated an end to the myth of common Chippewa interest created in earlier treaties by Henry Dodge and Robert Stuart. This was accomplished by permitting the Lake Superior Chippewa, who occupied the land to be ceded, to actually cede the country west of Lake Superior and east of a line between the East Swan River and Vermilion River to the north (Map 3). Henceforth this line would separate the territories of the Lake Superior and Mississippi groups which had heretofore supposedly owned the ceded tract in common. For their part, the Chippewa of the Mississippi agreed that the entire payment should go to the Chippewa of Lake Superior in return for their relinquishment of further territorial claims west of the Swan-Vermilion River line. Article 12 of the 1854 Treaty specifically excluded the Bois Forte (defined as a Lake Superior band) from this provision because of their unresolved claims to land in northern and western Minnesota. The treaty also formally identified bands belonging to the Mississippi or Lake Superior divisions for the purposes of future business with the United States. The Lake Superior bands were to include the La Pointe, Ontonagon, L'Anse - Lac Vieux Desert, Grand Portage, Fond du Lac, Lac Court Orielles, Lac du Flambeau and Bois Forte. The treaty also provided reservations for all of these bands and the Fond du Lac, Bois Forte and Grand Portage, the resident bands of the territory ceded, reserved the right to hunt, fish, and gather on the ceded territory.[303]

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[303] Treaty of La Pointe 1854, 10 Stat. 1109.

Thus, with one significant oversight Henry Gilbert managed to sever the co-mingled affairs of the Lake Superior and Mississippi Chippewa. Unfortunately, three of the bands who were party to the 1837 treaty and who lived on land ceded in that treaty were not represented at La Pointe. These were the Mille Lacs, Snake River and St. Croix River Chippewa. None agreed to the division of annuity payments, and none received treaty benefits nor negotiated reservations in the new treaty. Neither were they classified as being Chippewa of Lake Superior or the Mississippi. This was true despite the fact that at least some of these bands in fact regularly used some of the territory ceded. See Maps 3 and 7.

Because of their protests over the 1847 treaty, their complaints about Agent Herriman's insistence that their annuities be paid at Crow Wing rather than at La Pointe, and their kin association with the Lake Superior bands, the identity of the Mille Lac Chippewa was particularly ambiguous and especially so given the artificial nature of the term "Lake Superior Chippewa." Neither the United States nor the Mille Lacs knew if they were to be included with the Chippewa of Lake Superior or Chippewa of the Mississippi. In fact, the Mille Lacs had historical and cultural claim to membership in both groups.

Because of pressure to remove west as well as difficulties with lumber interests, the Snake River and many of the St. Croix Chippewa were living at Mille Lacs by the time of the 1854 treaty. At this period, these two groups also had common political interest and leadership. Why they were not present for the La Pointe Treaty is not known but several factors can be considered. First they

were certainly not on friendly terms with Major Herriman who was charged with bringing delegations to La Pointe from the west. In fact, five months later, Agent Herriman deliberately tried to exclude the Mille Lacs from discussions for the 1855 treaty.[304] Further, the two venerable chiefs of these bands *Naqwanabe* and *Kitchi Nodin* were old and travel would have been very difficult; both, in fact, died within a in few months of the 1854 treaty. A major reason, however, was very likely the confrontation playing out between the Mille Lacs and the lumber men over the dam on the upper Rum River. This was a situation of such vital importance that the Mille Lacs simply could not afford to turn their attention elsewhere.

As matters stood in the fall of 1854, the United States had just negotiated a new treaty of cession with the Lake Superior Chippewa which expressly repudiated removal by providing reservations within the territories ceded in 1837 and 1842 as well as in the territory ceded in the new treaty. Like the former treaties, the 1854 treaty also provided the right of the Chippewa to hunt, fish and gather in the ceded territory. In order to protect their interests while they did so, the Trade and Intercourse Act was extended over the ceded land which now became part of the Territory of Minnesota.[305] This provision of the treaty followed the precedent set in 1842 where the same laws

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[304] NAM M234 R. 150:216-218. Feb. 1, 1855. W. Gorman to Commissioner of Indian Affairs [Manypenny].

[305] MCT Def. Ex. 446. Aug. 22, 1848. Wm. Medill to J. Livermore.

MN007470. Dec. 3, 1849. O. Brown to J. Livermore.

were extended to parts of the states of Michigan and Wisconsin for the same reason. Thus, beyond the legal codification of hunting and fishing rights by these three treaties, the working application of the right was protected by extending federal law to govern Indian/non-Indian relations on the lands to be commonly occupied in the two states and the Minnesota territory.

As a practical matter, guaranteeing usufruct rights was the only means available to deal with Chippewa subsistence. As they were not agriculture people and had resisted agriculture even under the tutelage of government farmers, there was no choice but to guarantee them the right of hunting, fishing and gathering in the ceded territory as a matter of survival.

The treaties of 1842 and 1854 ceded approximately 22,167,000 acres and we know there were about 4,000 Chippewas living in this area in 1854.[306] Assuming that these were well adapted hunters, fishers and gatherers in the sense that population had reached a balance with the quantity and quality of resources which were necessary to maintain that population, then each Chippewa required about 8.6 square miles. This is the amount of land necessary to provide the food, clothing, shelter, medicine and other resources needed for survival, given the extraction methods which were in use.[307]

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[306] ARCOIA 1854.

[307] Cleland, Charles E. 1992, From Ethnohistory to Archaeology: Ottawa and Ojibwa Band Territories of the Northern Great lakes in *Text Aided Archaeology*, B. J. Little, (ed.), Boca Raton:CRC press, p. 97-102.

The treaty of 1854 provided these same 4,000 Chippewa with five reservations with a combined area of 287,520 acres. This means that there was 0.11 square miles of land for each Chippewa or a reduction of 98.7%. Clearly this reduced area could not provide a sufficient resource base to support the population.

Likewise, when we turn to the area ceded in 1837 we find a similar situation. Assuming that there were approximately 2,000 Chippewa in this cession area and that seven million acres were ceded, each Chippewa would have needed 5.47 square miles for his or her support. If the reservations for the Chippewa of the 1837 cession, which were made in the treaties of 1854 and 1855 are combined, 396 square miles of land and water was provided by the treaties.[308] This means that each Chippewa would have available about 0.2 square miles of land, a 96.3% reduction. Put another way, the same population of 2,000 Chippewa could not possibly make a living on 3.6% of the territory they needed.

The fact that the newly created reservations were not large enough to support the number of people assigned to them was widely recognized at the time and neither

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[308] A population estimate for the 1837 cession at the time of the treaty was made by calculating from the estimated number of bands. These are as follows:

Post Lake, 1 band; Lac Vieux Desert, 1 band,; Lac du Flambeau, 4 bands; Lac Courte Oreilles, 5 bands; Snake River, 1 band; St. Croix, 3 bands; Rum River, 1 band; and Mille Lacs, 4 bands. There were at least 20 bands residing in the ceded territory. Each band would have between 100 and 150 people so that the total population would be between 2,000-3,000. The lower figure is used in these calculations.

Chippewa nor government officials expected that they would confine themselves to these small reservation areas (see Chapter 12). While it was hoped that one day in the future the Chippewa would adopt an agrarian lifeway making reservation life a reality, it was not a reality in the mid-nineteenth century nor in the north country did it ever become so. In 1863, the Fond du Lac Chief *Nawgawnab*, repeated to Commissioner Dole what agent Henry Gilbert explained to them on this point during the negotiation of the 1854 treaty. " . . . and then in regard to our reservations, at the time of the treaty the Commissioners, at least Gilbert, told us that our reservations were not to confine us all together to live upon them – that we should have the privilege of going out of it whenever we had a mind for hunting purposes and it is on account of that also that we want our patents."[309]

Chapter 10

The Treaty of Washington 1855

During the month of December 1854 Commissioner of Indian Affairs George Manypenny was busy dealing with the Chippewa of Minnesota. Early in December he forwarded the La Pointe Treaty to Secretary of Interior McClelland recommending its approval by the Senate.[310]

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[309] NAM T494. Documents related to the negotiation of ratified and unratified treaties. Ratified treaty No. 322, treaty of March 11, 1863 with the Mississippi, Pillager and Lake Winibigoshish bands of Chippewa Indians. Conference of Feb. 17, 1863, p. 30.

[310] MCT. Dkt 18C. S,T, Ex. 115. Dec. 8, 1854. G. Manypenny to R. McClelland.

With the lands west of Lake Superior ceded, he was anxious to acquire the remaining land claimed by the Chippewa in the Territory of Minnesota. On December 17 the Senate approved the bill appropriating money for the purpose of "the extinguishment of the title of the Chippewa Indians to the land owned and claimed by them in the Territory of Minnesota and [the] State of Wisconsin, and for their domestication and civilization."[311] Mr. Rice, who was to become Manypenny's advisor in setting up the new treaty wrote with some advice in mid-December. First he urged that the treaty be made as soon as possible. Speed, he reasoned was required by "humanity" since, he contended, the northern Chippewa were starving as hunters and gatherers and could only be saved by "placing them in a position that they would be able to cultivate the soil." Rice went on to recommend that the treaty be negotiated in Washington because "a treaty in their own country would be attended with great expense and with results not only disadvantageous to the Indians but to the Government . . . " Next, he advised that Hole in the Day, Flatmouth and several other unnamed chiefs be brought to Washington for the purpose of acquiring the cession. The lands claimed by these chiefs, as Rice understood them, included "all the land drained by the waters of the Mississippi, a part of the land on the Red River of the north (from its source down) and also the lands [word unintelligible] north of the Mississippi to the British possessions." These territories, Rice contended, could be had

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[311] Congressional Globe (33rd Congress, 2nd Sess.) Dec. 17, 1854. Vol. 24, p. 75.

for a small price. Finally, he urged Manypenny to conclude the treaty before the end of the present session of Congress.[312]

Manypenny lost no time. He wrote immediately to Governor Gorman directing that Agent Herriman at Crow Wing be dispatched to round up Hole in the Day and six Mississippi Chippewa chiefs plus Flat Mouth and two other Pillager chiefs. He was to have this delegation of Chiefs "authorized" to make a sale of their lands in Washington by February 10.[313] *The Daily Minnesotan* of February 3 reported that the Pillager delegation passed through St. Paul on February 2. Listed were their conductor J.W. Lynde, the Leech Lake chiefs Flatmouth, Buffalo, Young Man's Son and *Mebjigahbo* and the Lake Winnibigoshish chiefs Eagle and *Cahbemurpe*.[314] Interpreter Peter Roy also accompanied this group.

Towards the end of the last week of January a Mississippi Chippewa delegation under the care of Agent Herriman left for Washington. Besides interpreters Truman Warren, Paul Beaulieu, and Edward Ashman, it included the Gull Lake and Rabbit Lake Chiefs Hole in the Day, Crossing the Sky, Bad Boy, Little Hill, Crow Feather and One Who Knows, and Coming Home, a St. Croix Chippewa.

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[312] NAM M234 R. 150:151. Dec. 17, 1854. H. Rice to G. Manypenny.

[313] NAM M234 R. 150:219-221. Jan 4, 1855. G. Manypenny to W. Gorman.

[314] *Daily Minnesotan* Feb. 3, 1855. "The Chippewa"

When news reached Mille Lacs about the impending treaty, the chiefs were shocked to have not been included. They immediately informed Governor Gorman who reported the situation to Manypenny on February 1. In the Governor's view, Herriman had deliberately excluded the Mille Lacs, an action which Gorman believed not only to violate Herriman's duty as an agent, and also favor outside interests. In this he was apparently referring to the Crow Wing trading interest. In fact, the Mille Lacs had made serious charges against agents at Crow Wing since the late 1840's and were particularly chagrined about having to go to Crow Wing for payments, a place they referred to as "Whiskey City".[315] The difficulty with the agents apparently began over charges made by *Naqwanabe* to Superintendent Richmond that the agent was paying trader debts out of treaty annuities and other irregularities including collusion between the agent and Hole in the Day.[316] The Mille Lacs also complained about the violence at Crow Wing due to unsupressed liquor traders who gathered for the annual Indian payment. Some years later in 1864, *Showbaushkung* informed Secretary of the Interior Thompson that the Mille Lacs had lost forty people who were killed at the Crow Wing payment over the last three years.[317] In their complaint to Gorman,

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[315] Kugel, R.A. 1986 To Go About the Earth: An Ethnohistory of the Minnesota Ojibwe; 1830-1900. Unpublished PhD dissertation, Univ. of California: Los Angeles, p. 172-173.

[316] NAM M234 R.390 Oct. 2, 1848. *Naquonabi* et al. to W. Richmond.

NAM M234 R.390 Nov. 14, 1848. *Nagonabe* to J. Livermore.

[317] NAM M234 R. 154:92. Aug. 21, 1864. *Showbaushking* to C. Thompson.

the Mille Lacs said that they had been prevented from attending the La Pointe treaty in 1854 and were "determined not to lose their rights this time by foul play . . . "[318] The Mille Lacs chiefs also claimed that Herriman had taken a St. Croix chief [Coming Home] to represent them. They were outraged at this as they told Gorman that they could not believe that their Great Father would do them such an injustice.

Governor Gorman told Manypenny that a Mille Lacs delegation had arrived in St. Paul the day before Herriman started for Washington. Thus, it seems, Herriman must have personally excluded them. They then saw Gorman who ordered Herriman to take them to Washington, but since Herriman had already departed, Gorman placed the Mille Lacs chiefs under the care of interpreter Clement Beaulieu for the trip.[319] There is no record of when the Mille Lacs delegation departed.

For whatever the reasons, three separate Chippewa delegations went to Washington to negotiate for permanent homelands in Minnesota. At least the Mississippi delegation and the Pillager-Winnibigoshish delegation negotiated as separate political entities; the role of the third or the Mille Lacs delegation is unknown but the treaty includes them with the first Mississippi Chippewa group. Members of the delegations were as follows: Mississippi bands: *Pugonakeshik* (Hole in the Day), Gull Lake; *Quewesansish* (Bad Boy), Gull Lake; *Wandekaw* (Little Hill),

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[318] NAM M234 R. 150:217. Feb. 1, 1855. W. Gorman to COIA.

[319] NAM M234 R. 150:217. Feb. 1, 1855. W. Gorman to COIA.

Gull lake; *Iaweshowewekesik* (Crossing the Sky), Rice Lake; *Mahyahgewaywedurg* (The Chorister), Pokegama; and the Mille Lacs chiefs: *Petud-dunce* (Rat's Liver), *Munominekayshein* (Rice Maker), *Kaygwadaush* (The Attempter), and *Showbaushkung* (He That Passes Under Everything). The Pillager-Winnebigoshish delegation included *Aishkebugekoshe* (Flat Mouth), Leech Lake; *Pishake* (Buffalo), Leech Lake; *Naybunacaush* (Young Mans' son), Leech Lake; *Maugegawbo* (Stepping Ahead), Leech lake; *Migisi* (Eagle), Lake Winnibigoshish; and *Kawbemubbee* (North Star) Lake Winnibigoshish. The place of residence of *Caucangewegwan* (Crow Feather) is unknown.

It is not known exactly when these delegations actually arrived in Washington but the Herriman group met with Manypenny on Monday evening the 12th of February and the Pillager's delegation met with him on Tuesday, February 15. When the Mille Lacs delegation arrived is not known. Lt. Hamilton who was dispatched to Mille Lacs to investigate the dam incident noted on February 26 that the chiefs were gone to Washington.

A journal which purports to represent the negotiation of the 1855 treaty indicates that the Chippewa met as individual delegations and collectively with Commissioner Manypenny ten times between Monday, February 12 and Thursday, February 22, the date the treaty was signed.[320] Three more meetings were held on March 8 and 9 for the purpose of adjusting and approving money claims of traders under the new treaty.

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[320] NAM T494 R. 5:307. Documents Relating to the Negotiations of the Treaty of Feb. 22, 1855.

The journal is very helpful on some points such as understanding the relationship between Manypenny and the chiefs, the relationship among the chiefs, the issues discussed and some negotiating positions. The journal does not provide insight into the discussion among the chiefs, nor does it give much information about specific details of the treaty. In fact the records of most of the meetings do not even permit identification of those in attendance.

Manypenny met the Mississippi delegation socially on the evening Monday February 12 and again arranged an informal social meeting with them as well as the Pillager-Winnibigoshish delegation on the evening of Thursday February 15. Actual treaty business was conducted in three meetings on Saturday the 17th, on Monday the 19th, and Tuesday the 20th of February. On these occasions the Mississippi bands met the Commissioner at four separate times, the Pillager-Winnibigoshish delegation met once alone with Manypenny and on one occasion in company with the Mississippi bands. On Wednesday the 21st the delegations met jointly to have the treaty read to them and on Thursday the 22nd of February they jointly met to sign it.

The journal is very informative about the atmosphere of the negotiations. All the talks were very rushed with Manypenny telling the Chippewa on separate occasions that they needed to act quickly while Congress was still in session. He informed them that this meant they had only 12 working days. It is also evident that there were at times difficulties in translation. Since none of the Chippewa chiefs spoke English, all business was conducted through interpreters. There is some indication that Hole

in the Day may have understood some English but did not speak it.[321] At one point Manypenny remarked that one of the difficulties in Indian-American relationships was that Indians could not read or understand written contracts (treaties).[322] On another occasion interpreter Paul Beaulieu asked the speakers to slow down so he would not have to trust his memory and on another he said he was having trouble getting the chiefs to understand large numbers.[323]

We know from the journal that sometimes the room was cleared of all parties so that the Indian delegations could confer in the absence of interpreters, traders or other interested parties. On the other hand, Henry Rice was not only permitted to attend but actually represented both the Mississippi and Pillager-Winnibigoshish delegations on separate occasions.

Perhaps the most revealing aspect of the journal concerns the attitude which Manypenny held toward his Chippewa guests. Here we see shocking insensitivity, moral self righteousness and paternalism. Manypenny displayed not the slightest understanding for, or appreciation of, Indian culture. He took a very disrespectful tone with the Chippewa, addressing Hole in the Day, a prominent Chippewa war chief as "my young friend." When the venerable Pillager Chief Flatmouth said he needed time to consider a proposal, Manypenny chided

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[321] Babcock Transcripts Box 2. *Weekly Minnesotan* Oct. 28, 1854.

[322] NAM T494 R. 5:320.

[323] NAM T494 R. 5:345.

him saying that young, inexperienced men need time to think but old men should be prepared to make decisions. In a situation of such gross disrespect that it caused the Chippewa to consult among themselves, Manypenny told the great Leech Lake chief *Pishake* that if he were younger, he would insist that he remove his headdress. After *Pishake* politely explained that such was a sign of honor and distinction among the Chippewa, Manypenny lectured him about face painting, saying it was a waste of time and effort.[324]

The tactics of holding the treaty in Washington in order to impress the Chippewa with the greatness and fecundity of the American people seems to have had its intended effect. Several of the chiefs remarked on the advantages of wealth, citizenship, and train transportation.

As far as we can tell from the journals, almost all the negotiation was done by Hole in the Day and Flatmouth who Manypenny and Rice had earlier anointed as head chiefs for the "authorized" delegations. In addition to these two, Buffalo or *Pishake* occasionally spoke and on at least one occasion *Maghegabo, Migisi, Kawbemubbee,* and *Winneshick* added to the discussion. Ten of the sixteen Chippewa who signed the treaty are not recorded to have participated in public negotiations, assuming they were present at all, including all the Mille Lac Chiefs.

Alone and isolated in a new and very strange environment the Chippewa had no option but to trust the Americans. Some of this trust was symbolic, that is,

[324] NAM T494 R. 5:330,338.

embodied in the complex social, political, and psychological relationship between the "Great Father" and the "Chippewa children". Some was mystic, embodied in the sacredness with which the Chippewa regarded the written word. In the former case the Chippewa believed that the relationship between the President and themselves was one of mutual support and loyalty. Since they had fulfilled their part of this relationship, they believed the Great Father would do likewise. Moreover, the Chippewa clearly imbued the written word with its own special significance. For example, when Manypenny cautioned that the Chippewa could be cheated with documents since they did not read, Hole in the Day replied that while this was true "they were persons who have faith in paper, it is as good and valid as if they could read it." When Manypenny warned against this view, Hole in the Day replied that "our people must have faith in somebody or they cannot trust anybody."[325] Obviously the Chippewa placed a degree of trust in the written word which was perhaps uncommon among nineteenth century Americans.

The extreme vulnerability of the Chippewa in Washington is shown by the fact that they turned to territorial senator Henry Rice for advice. Rice acted as council for both the Pillager and Mississippi delegations and apparently was even trusted to set the price per acre to be received for the cession. Although characterizing himself as a friend of the Indians, Rice was a major fur trade merchant with trading interest throughout the Upper

[325] NAM T494 R. 5:321.

Mississippi region including Crow Wing. As a representative of the Rum river lumber interests, he was especially unsuited to represent the Mille Lacs.[326] Henry Rice was a powerful man in both Minnesota and Washington who often represented competing interests when dealing with the Chippewa and not infrequently, his own.

Manypenny left no doubt about the purpose of the treaty when he cited the object of the Chippewa's visit "was to buy from them a portion of their land in the Mississippi country, which, when the Chippewa become cultivators of the soil like white men they will not want or be necessary for their support."[327] Hole in the Day reiterated this objective when he said that "we come to make a new treaty for the sale of all that if left of our land and to change our habits of life."[328]

The 1855 Treaty discussions reflect a complex interplay between different objectives of the parties as well as simple negotiating strategy. Manypenny of course wanted Chippewa land, but was also determined to concentrate the Chippewa on reservations and to civilize them. As part of his strategy he pushed the benefits of reading and writing, economic wealth, settled agriculture and other features of civilized life. It had long become a tactic of the Chippewa as well as other Algonquian

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326 Stanchfield, Daniel. 1901 History of Pioneer Lumbering on the Upper Mississippi and its tributaries, with biographical sketches. St. Paul:Minnesota Historical Society Vol.IX p.325-362.
NAM M234 R.428:804-05. Jan.10,1854. H.Rice to R. McClelland.
NAM M234 R.151:118 Feb.7,1856. H.Rice to G.Manypenny.

327 NAM T494 R. 5:318.

328 NAM T494 R. 5:376. Documents, etc.

speaking Indians to play to their progress toward civilization in order to ingratiate themselves with Americans while at the same time they were struggling to maintain their own traditions.[329] In this view chiefs often reassured their agents that they were now wearing white mans clothes, living in cabins, sending their children to school and working hard tending their gardens. They knew this was exactly what the government wanted to hear. Hole in the Day was particularly accomplished at this strategy. It was of course true that Hole in the Day was progressive. He lived in a finely furnished cabin near Crow Wing, drove an elaborate buggy and operated a productive farm and a ferry on the Mississippi river. On the other hand he spoke only Ojibwa, was not a Christian, had six wives and was a renounced war chief who had killed many Dakota and at least one white man.[330] It is difficult to know what Hole in the Day meant when he said that one of the purposes of the new treaty was to "change our habits of life"; Hole in the Day was certainly astute enough to know that was exactly what George Manypenny wanted to hear.

The journal shows that Manypenny tried yet once again to use the old ploy of consolidating the interests of the Chippewa groups to obtain the cession of all their claims. He did this by stating that "he did not think the

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329 McClurken, James. 1988 *We Wish to be Civilized:Ottawa-American Political Contest on the Michigan Frontier.* Phd. dissertation, Michigan State University.

330 Diedrich, Mark. 1986. The Chiefs Hole in the Day. St.Louis Park, MN, Coyote Books.
MN 004500 Feb. 2, 1849. C. Oaks to V. Fletcher.

Chippewa had any distinct interest" and that "he could recognize among them no separate or rival interest."[331] Flatmouth cleverly disabused Manypenny of this notion, "We should have no conflicting interest, but we are in this respect like the whites. We have separate and distinct interests."[332]

Manypenny was forced to accept this position, but since he was forced to deal with the claims of each group, he asked them to map out their specific territorial claims. Hole in the Day resisted this request because he hoped to sell the combined territory claimed by the Mississippi, Pillager and Winnibigoshish, estimated at 10 to 11 million acres, at a single price per acre (Map 3). Some of this same land was undoubtedly also claimed by other Chippewa groups. Again, Flatmouth explained to Manypenny that Chippewa band territories could not be so easily defined since Chippewa territories did not represent fixed political subdivisions of the landscape. As he put it, it was not his purpose "to state precisely what our bands claim as a right. We are not like the whites. We differ among ourselves in respect to our boundaries."[333]

Despite such exchanges and some quibbling over payments, the journal contains little evidence of meaningful negotiations. The authorization bill for the 1855 Treaty listed the following objectives: extinguish title to remaining Chippewa land in Minnesota and Wisconsin, provide reservations which could be allotted, provide

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[331] NAM T494 R. 5:330-31. Documents, etc.

[332] NAM T494 R. 5:332. Documents etc.

[333] NAM T494 R. 5:339. Documents etc.

payment of annuities and services in home communities, extend benefits to mixed bloods, extend the U.S. laws prohibiting the sale of liquor to Indians in the territory ceded, and finally, provide Presidential power of rule making to cover enforcement of regulations not mentioned by the treaty.[334] The Treaty of February 22, 1855 includes exactly these provisions.[335] In addition, it adds several articles which are standard features of most Manypenny's treaties: the right of pre-emption for missionaries, the right of Indians to be compensated for roads crossing reservations, a peace provision in which the tribes promised tranquil relations with each other and the United States, and an article binding the parties when the treaty was ratified by the President and the Senate. Thus, besides the details of payments, there was only one provision of the treaty on which the Indians insisted over Manypenny's mild objection. They maintained that they should have the right to hire their own farmers, mechanics, and teachers. The government conceded this point and it appears in the treaty as Article 4. Other than this one article the treaty could have essentially been prepared before the Chippewa ever arrived in Washington.

As far as the United States was concerned, the real purpose of the February 22nd treaty was to acquire Chippewa lands in northern Minnesota; it remained only to define which lands and how much was to be paid. As a

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[334] Congressional Globe (33 Congress, 2nd Session) Ch, 6,7. Dec. 17, 1854, p. 598-599.

[335] Treaty of Feb. 22, 1855. 10 Stat. 1165.

result of conflicting approaches to dealing with boundaries, the full territorial claims of the Mississippi Pillager and Winnibigoshish Chippewa were never defined in the context of the 1855 treaty discussions. Manypenny and Rice knew that at least the Pillagers had very broad territorial claims. As early as the Treaty of Prairie du Chien in 1825 it was known that the Chippewa claimed lands in northern Minnesota to at least the Red River on the west and to the Canadian border on the north. These claims were repeatedly noted by Federal officials, most immediately by Rice in his Dec. 17, 1854 letter to Manypenny.[336] Since 1825 the Chippewa had made even more extensive claims as a result of conquest.[337] Alexander Ramsey in his annual report for 1850 noted that the Pillagers and the Red Lake bands claimed not only land in Minnesota but "claim, by title of conquest and actual possession, a large tract of country lying west of the Red River."[338] However, the map which was drawn during the 1855 treaty negotiations to show the cession and the acreage estimates of the claims of the various bands did not encompass all of these potential claims.

Forwarding the 1855 treaty to the Senate for ratification, Manypenny noted these potential additional claims: "the quantity of land ceded according to the boundaries defined in the first article, is estimated at from eleven millions to fourteen millions of acres, beside which, those Indians (and especially the Pillager and Lake

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[336] ARCOIA 1848 p. 388. ARCOIA 1849 p. 1030-31.

[337] ARCOIA 1848 p. 388. ARCOIA 1849 p. 1030-31.

[338] ARCOIA 1850 p. 89.

Winnibigoshish bands) have some right or* interest in a large extent of other lands in common with other Indians in Minnesota, and which right or interest as above stated, is also ceded to the United States."[339] A map included with Manypenny's letter shows the territory ceded in northern Minnesota and the reservations.

To summarize the situation, on the eve of the 1855 treaty government officials knew there were broad overlapping claims to the lands occupied by the Chippewa of Minnesota. They knew that these claims extended west of the Red River and that in northern Minnesota the claims of the Pillager and Winnibigoshish bands overlapped Chippewa groups such as the Red Lake and Bois Forte who claimed land north to the British border.[340] The Bois Forte bands claimed lands ceded in both the 1854 and 1855 treaties but were denied rights to share in annuities by the Mississippi and Pillager bands. Thus, Manypenny was perfectly aware that some of the land claimed by parties to the 1855 treaty was also claimed by Red Lake and other Chippewa groups and that the Mississippi, Pillager and Winnibigoshish bands claimed or could claim lands beyond those which were being ceded. Lacking the old fiction of "common Chippewa land" and with his failure to extract complete and specific claims of territorial ownership from each party to the treaty, he was

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[339] Senate Document 70(33-2)756 March 1, 1855 containing letter of G. Manypenny to R. McClelland, Feb. 23, 1855. (*the original handwritten version says right "or" interest while the printed form reads right "of" interest).

[340] NAM M21 R.49:446-447. Aug. 11, 1854. G. Manypenny to H. Gilbert. ARCOIA 1848 p. 388. ARCOIA 1849 p. 1030-31.

faced with the possibility of having to not only buy the same land from several different groups but to buy land piece meal from the same group. To solve this latter problem, Manypenny dealt differently with land occupied as opposed to land claimed. The first class of land was bought outright while land claimed in common with other bands or by right of conquest was cleared by a general sign off of rights and interests.

Thus, in the 1855 Treaty Manypenny wanted to make sure that he extinguished title to all the land owned and claimed by the Mississippi, Pillager and Winnibigoshish Chippewa wherever those claims may be. He also needed to protect the legitimate claims of other groups to these same lands. Manypenny's solution is found in Article 1 of the February 22 treaty where he first expressly extinguishes title to the lands occupied and/or exclusively claimed by the three Chippewa groups party to the treaty. To do this he used a standard land title relinquishment clause stating that these bands "cede, sell and convey to the United States all their rights, title and interest *in and to the lands now owned and claimed by them in the Territory of Minnesota* and included within the following boundaries."[341] (emphasis added). Here follows the geographic description of the cession. Now Manypenny returned to the other class of land which was or could be claimed by the Mississippi, Pillager and Winnibigoshish bands outside of the described boundaries, that is, those claimed by right of conquest or in common with other bands. These claims were handled at the end of Article 1 with a catch-all provision which reads "And said Indians do further

[341] Treaty of Feb. 22, 1855. 10 Stat. 1165.

fully and entirely relinquish and convey to the United States, any and all right, title and interest, of whatsoever nature the same may be, which they may now have in and to *any other lands in the Territory of Minnesota or elsewhere.*" (emphasis added). The treaty journal does not reflect any discussion of this provision of the treaty, it was simply added by Manypenny as a measure against future claims to land.

Evidence that Manypenny understood the disclaimer in just this way can be found by returning again to the letter he wrote the day after the treaty was signed explaining its provisions to Secretary of Interior Robert McCllelland. He said that the impact of the treaty was that the Mississippi, Pillager and Winnibigoshish Chippewa of Minnesota "cede and convey to the United States all the lands owned *and* claimed by them in that territory *and* whatever right or interest they may have *in other lands* in common with other Indians there or elsewhere."[342] (emphasis added).

The role of the Mille Lacs delegation in the negotiation of the 1855 Treaty is somewhat of a mystery. It seems apparent that as far as Manypenny, Rice and the federal establishment was concerned this treaty was organized to acquire Chippewa land in northern Minnesota. Since the Mille Lacs bands already occupied ceded soil they were not as a group as important as those bands who occupied the territory to be ceded. The Mille Lacs chiefs, however, had a different perspective and different objectives, they

[342] Message to the President of the United States 33rd Congress, 2nd Sess. Feb. 23, 1855. G. Manypenny to R. McClelland.

were most anxious to acquire a permanent homeland in the form of a reservation. Since they did not sign the 1854 treaty which made reservations within the ceded territories they were particularly anxious that they now be included. Likewise, their status *vis a vis* the Lake Superior and Mississippi divisions important in determining annuity payments, was still in limbo.

Governor Gorman, perhaps more keenly aware of these local problems as well as the history of the bad blood between the Mille Lacs chiefs and agent Herriman supported the Mille Lacs position that they had to be involved in the treaty. In addition, Gorman must have known that the Mille Lacs were needed to deal with the Wisconsin boundary issue. This unceded land was neither occupied nor claimed by the Pillager or Winnibigoshish bands.

In truth, it is not known if the Mille Lacs participated in the negotiation of the 1855 treaty or if they were even present until after it was concluded. The treaty journal does not list the Mille Lacs chiefs among the Mississippi delegation nor, with the exception of a brief comment by *Munominekayshein* (Rice Maker) on Thursday, March 8, in regard to the discussion of the payment of debts to traders, is the presence of the Mille Lacs recorded.

There are, however, several good reasons to believe that they were present. First we know from the letter that Gorman wrote to Manypenny on February 1 that a Mille Lacs delegation was in St. Paul and had consulted with both agent Herriman and Gorman about the feasibility of their making the trip. We also know from this letter that Governor Gorman ordered that they go to Washington

and that he arranged for their transport in the company of Clement Beaulieu.[343] Assuming that they left shortly thereafter there was plenty of time to get to Washington for the treaty discussions. While none of the Mille Lacs chiefs are recorded to have spoken during negotiations, Clement Beaulieu did translate for the session held between Manypenny and the Mississippi bands on the afternoon of Tuesday February 20.[344] There is good evidence that the Mille Lacs were at least present in Washington by that day.

The Mille Lacs reservation as described in the treaty "embraces" fractional townships T42N, R25W; T42N, R26W; T42N, R27W; and T43N, R27W as well as three islands in the southern part of Mille Lacs lake. Map 8 shows the reservation boundaries superimposed over the cultural and ecological landscape as it existed in 1850's and 1860's when this country was subdivided by United States surveyors. The intention of Article 2 of the 1855 treaty which created the various land reservations was to provide a "permanent home" for the Mille Lacs and other Chippewa groups who signed the treaty. The Mille Lacs chiefs carefully selected the boundaries of their own reservation to include perpetual access to the rich aquatic resources upon which they depended. Within the boundaries were the main villages, clearings for gardens, fishing sites in Mille Lacs Lake, maple groves for sugar making, cranberry bogs and Whitefish *(Ogechie)* Shakopee (*Nessawae*) and Onamia Lakes, all critical for rice, waterfowl and fur trapping.

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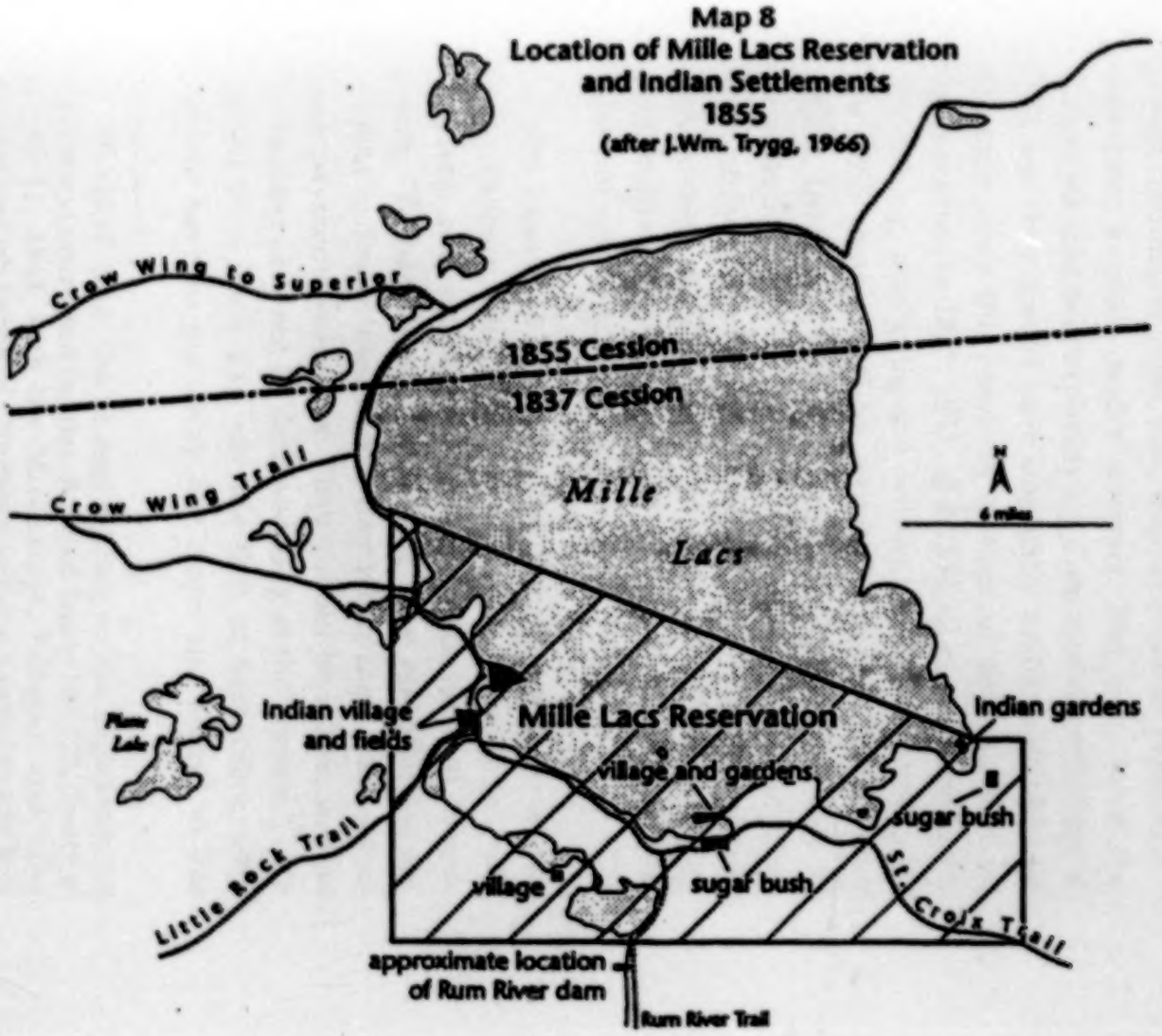
[343] NAM M234 R. 150:217. Feb. 1, 1855. W. Gorman to COIA.

[344] NAM T494 R. 5:381. Negotiations etc.

Map 8
Location of Mille Lacs Reservation
and Indian Settlements
1855
(after J.Wm. Trygg, 1966)



It was, of course, the understanding of both the Mille Lacs and the treaty commissioners that the Mille Lacs would continue to hunt, fish, trap, and gather plant materials over a much wider territory. Not only were the Chippewa told this explicitly by Commissioner Gilbert in 1854 but they would have implicitly understood it to be the case since the previous treaties of cession, that is, those written in 1837, 1842, and 1854 all guaranteed hunting, fishing, and gathering within the ceded territory.[345] The 1855 treaty itself by Article 3 provided shot, lead gilling twine for fish nets, and blacksmith services to promote subsistence related activities. In the closing sessions of the 1855 treaty negotiations, Manypenny himself admonished the Chippewa to stay out of debt, "Plant corn, cultivate your farms, sell furs, pay as you go and have not accounts with anyone . . . "[346]

On March 10, 1855 the journal shows Hole in the Day's concern with a possible conflict between annuity payment and subsistence activities. As he told Manypenny, "Father, there is one thing very essential for the Indians to know, that is, the day when they may expect their payments thereafter. They should be made, so that the Indians may not be detained long at the agency. There should be a fixed day, say the first of September, after that we have to put away our crops and attend to our

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[345] NAM T494. Documents relating to the negotiation of ratified and unratified treaties. Ratified Treaty No. 322, Treaty of March 11, 1863 with the Mississippi, Pillager, and Lake Winnibigoshish bands of Chippewa Indians. Conference of Feb. 17, 1863, p. 30.

[346] NAM T494 R. 5:497.

fisheries in the fall in order to be provisioned for the winter."[347] In the years immediately following the treaty, the Mille Lacs were often forced to complain that the payment of annuities in the late summer or in the late fall interfered with gathering of wild rice and fall deer and bison hunts.[348]

It is important to note that the 1855 treaty did not deal with hunting, fishing and gathering rights. It was so obvious to all concerned that these rights would not be impacted that the entire record of negotiations does not even mention the subject. Nor did the negotiations relate in any way to the 1837 cession. Apart from the creation of the Mille Lacs reservation, the Treaty of 1855 has nothing whatsoever to do with the 1837 cession. The wording of cession language, the cession itself and the entire negotiation of the treaty was focused on northern Minnesota.

The Chippewa who signed the 1855 treaty certainly did not think that it impacted hunting, fishing and gathering rights. Such rights were, of course, provided in the 1837 and 1842 treaties to which they were parties and in the 1854 treaty, such rights were also found in other treaties negotiated by Manypenny. It might be noted parenthetically that when usufruct rights were not consistent with U.S. objectives, Manypenny on occasion specifically terminated them by treaty.[349] It is also probable

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[347] NAM T494 R. 5. Mar. 10, p. 5.

[348] NAM M234 R. 152:269 N.D. 1861. *Shaboskung* et al. to President. NAM M166 R. 7:42. Sept. 25, 1861. L. Walker to C. Thompson.

[349] Treaty with the Chippewa of Sault Ste. Marie, Aug. 22, 1855. 11 Stats. 631.

that extension of the trade and intercourse laws pertaining to liquor to the whole ceded territory as had been the case in the 1842 and 1854 treaties, gave the Chippewa a belief that federal jurisdiction extended over them while they were away from their newly created reserves. The main reason why they would be traveling the ceded territory would be in pursuit of their traditional seasonal rounds.

The United States did not ask the Chippewa to surrender hunting, fishing or gathering rights of any kind or in any place in the Treaty of 1855. It was the expectation of the Chippewa and the United States that these rights would extend into the future for both subsistence and commercial purposes. Had Manypenny suggested any cession of such rights the Chippewa would have most certainly have vigorously protested. There was no need.

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Chapter 12
Off Reservation Hunting, Fishing, and Gathering in the Post Treaty Era

After the Civil War the Mille Lacs found themselves in a difficult predicament. The government had pledged that they could remain on their traditional territory but since they had not been given the promised training nor equipment to practice American-style agriculture they were almost totally dependent upon natural resources. Since the reservation at Mille Lacs was insufficient in size to provide the food, and resources for clothing, shelter and trade commodities for the more than seven hundred

people who identified themselves as Mille Lacs Chippewa, they continued to use, and in many cases, reside on their old territories throughout central Minnesota. Here, after the mid 1870's they came into increasing conflict with settlers who became their competitors for game, fish, and other resources. The settlers complained often and loudly to government officials about Indian hunters and asked that they either be removed or confined to their reservations. The government preferred that the Mille Lacs remove to the Leech Lake and later the White Earth reservation but was not prepared to remove them by force since the treaties of 1863 and 1864 gave them the right to remain. The Mille Lacs contended that they had not ceded their 1855 reservation but since its external boundaries had not been surveyed they were not sure of its exact location. To make matters worse, lumber men, attracted by the reservation's magnificent pine stands, as well as settlers seeking agricultural land, were beginning to encroach on the reservation. The chiefs were not able to stem this influx short of violence but an overt act on their part against this aggression would have provided the basis for the claim that they violated the 1863 treaty provision which stated that "they shall not be compelled to remove so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites."

Thus, as a practical matter the Mille Lacs had to leave the reservation to sustain themselves and when they did so whites constantly complained of their "bad conduct." On the reservation, they were subject to all manner of injustices from which they could not protect themselves without threatening their existence as an independent

people. To these threats the Mille Lacs chiefs and particularly the seasoned veterans *Shobaushkum*, *Mahnomenkayshe* and *Pedud-dunce* steadfastly insisted upon the collective rights of the Mille Lacs under the treaties of 1837, 1855, and 1863-1864. Although sometimes confused about the complex treaty history of the Chippewa, these chiefs knew the general body of rights to which they were entitled.

The history of the Minnesota and Wisconsin Chippewa during the last quarter of the nineteenth and the first half of the twentieth centuries was dominated by their struggle to preserve their reservations and their rights to hunt, fish, and gather under the treaties of 1837, 1842, 1854, and 1855. The reservation struggle was mainly fought in Minnesota and the hunting and fishing issue in Wisconsin. Both battles were difficult because the Chippewa had only the most minimal support from the Federal Indian establishment. During the era from 1880 to 1920 U.S. policy was to assimilate Indians into American society. Since treaty making was suspended in 1871 the government carried out its policy by congressional action and administrative policy which left Indians in a state of economic dependence and political powerlessness. By 1920 the assimilation policy left the American Indian as a "new" minority group on the fringes of American society.[372]

The General Allotment Act of 1887, the Indian boarding school system and a series of other federal actions in

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[372] Hoxie, Fredrick 1984 *A Final Promise: The Campaign to Assimilate the Indians, 1880-1920*. Lincoln:University of Nebraska Press. p. xiii.

the administration of Indian affairs had the combined effect of transforming Indians from the status of sovereign independent nations to dependent, domestic wards. Now, every aspect of the everyday lives of individual Indians came under the control and scrutiny of federal officials. During the period from 1880 until the passage of the Wheeler-Howard (Indian Reorganization) Act in 1934 Indians were subject to neglect by the federal government. While the government now had complete control over the lives of Indians, it provided little money for supervision over Indian affairs. During this period, Indians were impoverished and caught between federal jurisdiction as "Indian wards" and state jurisdiction as would be "citizens. In fact, Indians were virtually without power or protection of the law. It is under these conditions that their fight to save their reservation lands and preserve treaty rights must be understood.

During most of the late nineteenth century the Mille Lacs were preoccupied with trying to preserve the land which was provided to them as a reservation in the Treaty of 1855. At the same time that lumber interests were seeking to expropriate the resources of the reservation, citizens from surrounding farmsteads and towns objected to their using resources outside of the reservation boundaries. In either case, both lumber men and the citizenry believed the best answer was to move the Mille Lacs to some other area. The band's hunting and fishing on the territory ceded in 1837, a right guaranteed to them by treaty, again became a political weapon to argue for removal as it did in the years before 1850. For their part, the Mille Lacs along with the other Chippewa of Minnesota and Wisconsin steadfastly stood by their belief that

hunting, fishing and gathering rights were their right by treaty. This contention, which they have held from the time of the treaties until the modern day, was argued not in theory but by countless arrests, fines, confiscations and imprisonments suffered by tribal hunters and the destitution of their families.

During the years right after the Civil War, the bands centered at Mille Lacs continued to use their traditional territories which took up most of modern Crow Wing, Aitkin, Pine, Kanabec, Mille Lacs, Morrison, Benton, Sherburne, Isanti, Chisago and Anoka counties (Map 7). In addition, Mille Lacs hunters occasionally roamed to the west of the Mississippi and farther to both the north and to the east into the St. Croix valley and beyond.[373] During these rounds they became the subject of complaint by settlers.[374]

The Mille Lacs had their own complaints since it was obvious to them that they could not possibly support themselves with the resources of the reservation alone and that settlers were interfering with their rights to make a living from the land.[375]

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[373] ARCOIA 1869. Special Case 109. Aug. 25, 1882. G. Chapman Investigation of Mille Lacs Reservation. Special Case 109. June 27, 1883. W. H. Champion to Secretary.

[374] NAM M234 R. 154-55. Jan. 5, 1864. A. Morrill to C. Thompson. WPA Minneapolis Tribune. Oct. 7, 1868. NAM M234 R. 157:285-286. Jan. 24, 1870. A. Ramsey to E. Parker. Special Case 109 June 30, 1870. G. Atcheson to E. Parker. Special Case 109 Mar. 31, 1871. E. Smith to E. Parker. NAM M234 R. 163:331-336. Oct. 6, 1875. Petition of Citizens.

[375] NAM M234 R. 156:324. Sept. 29, 1867. G. DuBois to Whipple. NAM M234 R. 157:276-277. Dec. 27, 1869. J. Roberts to

In fact some of the complaints made against the Mille Lacs for subsistence activities in the ceded territory were motivated by a variety of causes including competition for game.[376] Their off-reservation difficulties were often linked to periodic failures of the wild rice crop which formed the main storable food commodity of the Chippewa people. In the time before the arrival of non-Indians when heavy rainfall and flooding or violent wind destroyed the rice crop, the Chippewa resorted to the charity of Chippewa in adjoining territories who might be more fortunate. When white settlers were included in this strategy of "spreading the risk" the Chippewa were accused of "outrages": including begging and theft. Examples of the rice failure-depredation cycle include the years 1867, 1868, and 1870 all of which created real hardship on the Mille Lacs.[377]

During the post treaty era the government of necessity supported hunting by the Mille Lacs in the ceded territory and supplied the fish nets, powder, shot, guns,

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A. Ramsey. NAM M234 R. 163:334. April 10 1876. C. Chadbourne to W. Fulsom.

[376] HW-MNHS Box 5, June 3, 1886. J. Johnson(?) to H. Whipple. NAM M234 R. 158:436. Sept. 21, 1871. H. Austin to E. Smith NAM M234 R. 167:973-979. Aug. 21, 1879. C. Williams to Adj. General. Special Case 109. May 25, 1880. Citizens Petition LROIA 961-1884. Jan. 11, 1884. C. Luse to H. Price.

[377] NAM M234 R. 156:324. Sept. 29, 1867. G. DuBois to H. Whipple. MN 002213. Oct. 29, 1867. Bassett to N. Taylor. MN MNHS Box 5, Jan. 6, 1868. Emmegabow to H. Whipple. MN MNHS Box 5, June 3, 1868. J. Johnson(?) to H. Whipple. Minneapolis Tribune. May 29, 1870. A Week in the Pine Woods. NAM M234 R. 158:10-12. Feb. 23, 1871. W. Fletcher to Adj. General.

and traps which helped make this possible. The Mille Lacs sometimes complained that the payment of annuities in the fall interfered with their hunting, fishing and gathering.[378]

In 1871 and frequently thereafter, settler complaints and later those of Minnesota officials started to include the notion that Indians were violating the newly enacted game laws by hunting out of season.[379] It was also suggested that Indian hunting, fishing, and gathering should be confined to the reservations. Since this was not possible, the Mille Lacs and other Chippewa asserted their rights to hunt, fish, and gather under their treaty agreements with the federal government. In their view, the hunting and fishing provisions of the 1837, 1842, and 1854 treaties extended collectively to all the territory ceded by the Chippewa. Sometimes the 1842 treaty was cited for the 1837 and 1854 cessions and many times the 1854 treaty rights were believed to cover the 1855 cession. The conclusion, however, is that the Chippewa believed they had the right to hunt on all ceded land by treaty agreement.

The States of Minnesota and Wisconsin strongly opposed this view. When American settlement of the

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[378] NAM M234 R. 154:92. Aug. 21, 1864. *Shobaushkum* to C. Thompson. NAM M234 R. 155:741. Dec. 12, 1867. J. Bassett to H. Whipple. NAM M234 R. 155:640. Dec. 14, 1867. D. Knickerbockers to COIA. NAM M234 R. 163:446-448. Jan. 19, 1876. Annuity Estimate 1876. NAM M234 R. 163:446-448. n.d. 1877. Annuity Estimate 1877.

[379] ARCOIA-1871. E. Smith to E. Parker. NAM M234 R. 158:10-12. Feb. 23, 1871. W. Fletcher to Adj. General. NAM M234 R. 161:23. Aug. 17, 1874. W. Bentley to E. Smith *Minneapolis Tribune*. July 30, 1882. Citizens Petition.

1837-1842 cessions began in earnest in the 1880's the states realized that hunting and fishing pressure were rapidly depleting game stocks. Access to the urban restaurant markets as the result of railroads deepened the crisis by creating an opportunity for market hunting. At Mille Lacs, channeling the Rum River outlet by lumber interest lowered the water level of the lake to the point that the fishery was adversely impacted. Later, in the twentieth century, the attempted use of mechanical rice harvesting equipment threatened that resource. The Mille Lacs band cooperated with the state to save the lake and rice marshes but refused to give up vital off-reservation resources.[380]

Henry Rice came to Mille Lacs in 1889 in order to arrange for the Mille Lacs to take allotments on their reservation rather than removing to White Earth. The Mille Lacs used his presence as a U.S. Commissioner to ask about many aspects of their affairs including off reservation hunting. Rice replied, "In regard to hunting deer, that is a matter for the legislature of the state to determine. You can hunt deer in any event, wherever you find them during the season set apart for hunting and wherever the white man may hunt, your young men will have the same right to do so."[381]

The Mille Lacs and the other Chippewa did not accept this view and of necessity continued to rely on

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[380] CCF Consolidated Chippewa, 57082-1934, 059. Newspaper clipping. CCF Consolidated Chippewa 57082-1934, 059. Aug. 16, 1929. E. Allen to COIA.

[381] 1889 n.d. House of Representatives 247(51-1)2747. Report of the Commissioners.

rice, wild game fowl, fish and collected plant foods for a living.[382] At least one agent, W.A. Mercer at Ashland, Wisconsin supported the Chippewa view. Writing to the Commissioner of Indian Affairs for advice Mercer said that "I have so far advised the Indians and required them to comply with state laws, but it is a question in my mind whether they have not a legal right to hunt and fish in the territory ceded by them in the treaty of September 30, 1854. Article 11 of said treaty states: "and such of them as reside in the territory hereby ceded shall have the right to hunt and fish therein, until otherwise ordered by the President." I would respectably ask for "information and guidance whether an order has ever been issued by the President prohibiting the right to hunt and fish, as reserved to them under the said article, and if they are notwithstanding the state law, still entitled to hunt and fish within the ceded territory."[383]

Soon thereafter, the government decided to accede to claims by the state that Indians not be permitted to hunt outside of their reservations except by state law. It is also evident that the Mille Lacs and other Chippewa were very much dependent upon off-reservation resources for both subsistence and commercial needs.[384] The result was

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[382] ARCOIA 1890. LROIA 1106-1891. March 21, 1891. H. Rice to T. Morgan. LROIA 34472-1894. Sept. 6, 1894. K. Nelson to COIA. LROIA 4002-1897. Jan 26, 1897. G. Beaulieu to COIA. LROIA 26750-1897. July 6, 1897. *Wawiieyamig* et al to COIA. MN 004481 April 15, 1897. G. Scott to COIA.

[383] LROIA 22633 June 12, 1894. W. Mercer to COIA.

[384] MN 004643. n.d. 1927. *Nahbahkan* to G. Schneider. CCF Consolidated Chippewa 13636-1927, 115. March 16, 1927. W. Eynon to COIA.

that during the opening decades of the twentieth century, hundreds if not thousands, of Chippewa hunters were arrested and charged with violating the state game and fish laws which they believed were superseded by treaty rights.[385] The federal government developed a standard reply to Indians who wrote to affirm treaty rights. They were told that they were subject to the court precedent especially the Supreme Court decision in *Ward v Racehorse* and later in *Kennedy v. Becker* as well as a great deal of precedent from local courts in Michigan, Wisconsin, and Minnesota.[386] In 1897 the U.S. District Attorney for Eastern Minnesota argued for the pardon of two convicted Indian hunters on the basis that the 1854 treaty was fundamentally different from the one involved in *Ward v Racehorse*. The parole board did not accept this view, although the Minnesota Attorney General agreed with the District Attorney's position.[387]

As the situation developed after the turn of the century the states began to claim the power to enforce state game laws against Indians even on their reservations as long as the Indian was a citizen and the offense occurred on fee land.[388] After the General Allotment Act of 1887 Indians who took allotments were subject to section 6 of that act which declared that allotted Indians were "subject to the laws, both civil and criminal, of the state or

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[385] CCF Consolidated Chippewa 55850-1928. Nov. 15, 1928. L. Mahoney to Dept. of Interior.

[386] MN 008166 Jan 26, 1938. O. Chapman to Atty General.

[387] MN 004481. April 15, 1897. G. Scott to COIA.

[388] MN003490 Apr. 17, 1907. S. Campbell to COIA.

territory in which they reside."[389] The states and federal government apparently did not realize that most of the Chippewa allotments in Michigan, Wisconsin, and Minnesota were made as a result of treaty. After 1924 when Congress passed the Indian Citizenship Act, the states claimed that all Indians were regarded as subject to state fish and game laws despite the provision of the act which states that it "would not impair or otherwise affect the right of any Indian or tribe."[390] Again, the federal government acquiesced to these claims by the states and finally only protected the hunting rights of non-allotted Indians exercising treaty rights on federal trust land. By the early twentieth century both were rare commodities.

Chippewa claims of treaty protected hunting and fishing rights were not dampened by this situation and throughout the twentieth century they continued to hunt, fish, trap, and collect rice and other plants over their former territories. Although they protested arrests, fines and imprisonments to the Bureau of Indian Affairs, the Commissioner, the Secretary of Interior, and the President of the United States, they were given no relief. Increasingly arrested Indians hired their own attorneys to fight arrest. In one such case occurring in 1911, Attorney Lewis Dalby wrote to the Commissioner of Indian Affairs asking a question which apparently flowed from the belief of many Indians that the hunting and fishing provision of the 1854 treaty applied to all of the territory ceded by the Chippewa. This understanding seemed to be linked to the fact that the Chippewa were common parties to the

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[389] US Stat.24:388-91. General Allotment Act. Feb. 8, 1887.

[390] US Stats 43:253. Indian Citizenship Act. June 2, 1924.

treaties and that the wording of Article 11 which reserves hunting and fishing rights applies generally to the territory ceded. They also believed that since the states and federal government still evoked the treaties to prohibit sale of liquor to Indians throughout the territories ceded in 1842, 1854, and 1855 that the treaties should also apply to the protection of hunting and fishing rights in the territory ceded.[391] Attorney Dalby also asked the commissioner if the president had ever revoked the Chippewa right to hunt and fish under the 1854 treaty. Unfortunately these questions were never directly answered by the federal government.

In the mid-1920's the federal government in review of the situation in the Great Lakes states had second thoughts about the power of the states to enforce their hunting and fishing laws against Indians exercising treaty rights. Assistant Commissioner of Indian Affairs E.B. Merritt wrote to John Hammitt at Lac du Flambeau in December of 1925 that it was his opinion that the Citizenship Act did not deprive Indians of treaty rights and that in regard to the 1854 treaty that no revocation of the right had ever occurred. He also stated that the question of treaty rights under the 1837 treaty was being taken up by the Department of Justice and that the Justice Department would be involved in future cases.[392] Several days latter the Chippewa chiefs at Bad River Wisconsin sent the Commissioner of Indian Affairs a detailed analysis of

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[391] MN 001927 Feb. 22, 1916. Charles Wakefield to J. Hinton. CCF Consolidated Chippewa 55850-1928, 115. Nov. 15, 1928. L. Mahoney to Dept. of Interior.

[392] MN 004394 Dec. 10, 1925. E. Meritt to P. Everest.

their view that hunting, fishing and gathering rights still existed under the 1837, 1842, and 1854 treaties.[393] This opinion was supported by their agent.[394]

Despite this momentary waver, the states continued to enforce their hunting and fishing statutes against Indians action which was particularly hard on the Mille Lacs. This was true because they were still not growing crops and because they were getting gradually dispossessed on their own reservation where in any case natural resources were being diminished because of the action of American settlers.[395]

It was not until 1930 in response to an inquiry from William Ackley, a Chippewa chief from Lac du Flambeau about the extent of treaty rights in the 1837 and 1842 cessions, that Commissioner of Indian Affairs Rhoads took the position that President Taylor's executive order of 1850 had canceled those rights. This position was commonly repeated by government officials thereafter in support of their position that hunting and fishing rights no longer existed in the ceded territory.[396]

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[393] MN 004187. Dec. 16, 1925. Chiefs to C. Barke.

[394] MN 008194. Dec. 21, 1925. J. Hammitt to COIA.

[395] LROIA 34762-1904 May 23, 1904. J. Bede to COIA. MN 004643 n.d. 1927. Nahbahkan to G. Schneider. CCF Consolidated Chippewa 55850-1928, 115, Nov. 15, 1928. L. Mahoney to Dept. of Interior. CCF Consolidated Chippewa 60673-1928, 115. Dec. 19, 1928. C. Burke to H. Knutson. CCF Consolidated Chippewa 68370-1937. Nov. 2, 1937. B. Reynolds to S. Callier.

[396] MN 004805 Oct. 15, 1930. C. Rhoads to W. Ackley. MN 004796 Feb. 4, 1931. COIA to J. Ryder. MN 008116. Jan. 26, 1938. O. Chapman to Atty. General. CCF Great Lakes 41544-1939, 931. July 8, 1939. V. Sawyer to H. Knutson.

Thus it was not until after seventy five years of heated controversy over the extent of Chippewa treaty rights to hunt and fish, a great deal of correspondence between the federal establishment and state governments and hundreds of court cases that anyone raised the existence of President Taylor's executive order. The fact that it was not cited in the nineteenth century when both the order and the conflict between treaty hunters and citizens was more immediate is an indication that contemporaries, neither Chippewa nor American, regarded it as having any force at all. Even in the face of this new argument the Chippewa in general and the Mille Lacs in particular continued to not only claim the right of hunting, fishing, and collecting in the ceded territory but to practice it as well. For their part the states of Michigan, Wisconsin and Minnesota continued to disregard these treaty rights.

In 1940 the Mille Lacs tribe represented less than a thousand people clinging to a few small private land holdings and trust allotments scattered around Mille Lacs lake and in the territory they ceded in 1837. Their standards of health, housing, education and general economy were so low as to shock the average American. They had essentially no resources for tribal government in the modern sense of the word and no capacity to challenge state interference with their treaty rights. They did, however have a strong sense of themselves as a people and a belief that their treaties afforded them a special status within American society.

When in the summer of 1940 the consolidated Chippewa Agency sent out a questionnaire about the status of

wildlife on the reservation and the existence of conservation measures it was answered by Charles Morrison and Earl Stinson Minnesota Extension Agents after consultation with Mille Lacs Indians.

Question 9: In the interest of conservation, should hunting and fishing regulations for Indians be similar to the state fish and game laws?

Answer: "No." The Indians say – hunt and fish for own food – not for sale.

Question 11: Have the Indians of the above reservation been consulted concerning wildlife conservation? What is their attitude toward the regulation of hunting, fishing, and trapping in the interest of conservation?

Answer: Yes – they want to abide by the old treaty regulations.

Question 13: Discuss briefly the relationship between the Indians and the state with respect to wild life conservation?

Answer: Not a good feeling between state and Indians. They want to deal with government and according to old treaties.[397]

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[397] July 15, 1940. Report on Wildlife, Mille Lacs Reservation.

Report And Direct Testimony Of Professor Thomas Lund For Plaintiffs (January 3, 1994)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

MILLE LACS BAND OF CHIPPEWA INDIANS, ARTHUR GAHBOW, WALTER SUTTON, CARLEEN BENJAMIN, and JOSEPH DUNKLEY,	)	
Plaintiffs,	)	Civil No. 4-90-605
UNITED STATES OF AMERICA,	)	
Plaintiff-Intervenor,	)	
vs.	)	
STATE OF MINNESOTA, MINNESOTA DEPARTMENT OF NATURAL RESOURCES, and ROD SANDO, COMMISSIONER OF NATURAL RESOURCES,	)	
Defendants,	)	
COUNTY OF AITKEN, *et al.*,	)	
Defendant-Intervenors,	)	
JOHN W. THOMPSON, *et al.*,	)	
Defendant-Intervenors,	)	
and SAVE LAKE MILLE LACS ASSOCIATION,	)	
Amicus Curiae.	)	

REPORT AND DIRECT TESTIMONY OF PROFESSOR THOMAS LUND FOR PLAINTIFFS

[This version includes errata as of January 23, 1994]

/s/ Thomas Lund
Professor Thomas Lund
January 23, 1994

The 1837 and 1855 Chippewa Treaties in the Context of Early American Wildlife Law

/s/ Thomas Lund
Professor Thomas Lund

January 3, 1993

Introduction

In 1837 the Mille Lacs Band of Chippewa Indians was party to a treaty with the United States which contained the following provisions:

> Article 1. The said Chippewa nation cede to the United States all that tract of country included within the following boundaries: . . .
>
> Article 5. The privilege of hunting and fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied to the Indians, during the pleasure of the President of the United States.

In 1855 the Mille Lacs Band was party to a treaty with the United States which contained the following provision:

> Article 1. . . . And the said Indians do further fully and entirely relinquish and convey to the

United States, any and all right, title, and interest, of whatsoever nature the same may be, which they may have in, and to other any other lands in the Territory of Minnesota or elsewhere.

In July 1993, I was contacted by attorneys for the Mille Lacs Band of Chippewa Indians and retained to provide an opinion concerning certain issues relevant to the case in light of my expertise regarding the history of early American wildlife law. This report addresses the following three questions:

1. Would the drafters of the 1855 treaty have understood a grant of all right, title and interest in land to compromise the right to take fish and game on the conveyed land?

2. Would the 1837 or 1855 treaty drafters have understood the privilege of hunting and fishing guaranteed under Article V of the 1837 treaty to be right, title or interest in lands?

3. On which lands, public and private, would the 1837 treaty drafters have understood that the Chippewa could exercise the privilege of hunting and fishing guaranteed under Article V of that treaty?

I have been asked to prepare an historical analysis of these questions, focussing on the prevalent legal doctrines of the period and the likely understanding of an American lawyer of the day who had been commissioned to draft the treaties. I have not undertaken, nor have I been asked to undertake, an analysis of the Indians' understanding of the treaties, or the proper construction

of the treaties based on currently applicable legal doctrines and canons of construction developed by the federal courts to construe the meaning of Indian treaties.[1]

The proper analysis of these questions calls for historical analysis. Archaic common law doctrines are involved such as hereditaments, the various franchises of the chase, and the interests of free, several, and common fisheries. The nineteenth century privilege to enter land involves the doctrines of trespass, but not "trespass vi et armis," not "trespass to try title," not "trespass on the case," but only "trespass quare clausum fregit."

An historian may alert the court to the importance of nineteenth century procedural rules. Common law practice analyzed the plaintiff's case according to the writ he or she had chosen. Each "form of action" involved a substantive law unique to the particular writ. As F.W. Maitland observed, a plaintiff might find "that, plausible as his case may seem, it just will not fit any one of the receptacles provided by the courts [within the writs, the forms of action] and he may take to himself the lesson that where there is no remedy there is no right."[2] As the United States Supreme Court explained, "Want of remedy was, therefore, quite reasonably synonymous with want of right."[3]

An historian may help the court identify and evaluate sources. Modern research tools such as computer data bases do not cover early sources. An historian can provide assurance that the basic texts are identified. Furthermore an historian may provide insight into the weight of sources, the significance of Blackstone, for example, as an authority second only to the Bible.[4]

An historian may provide the court expert information on foreign law. Nineteenth century American law "received" the English common law "to the extent applicable to the new conditions on the American continent."[5] English precedents were often more important than American cases.

Finally an historian may help explain the context of a distant transaction. Courts often rely upon context to understand modern controversies; an historian discovers and explains the context of remote events.

My credentials as an historian appear in full in Appendix II. I have not previously appeared as an expert witness nor do I have any prior relationship with any Tribe or Band of Indians. I am being compensated at the rate of $100 per hour for my services in this case.

I was educated at Harvard College (A.B., 1964, cum laude, general studies), Columbia University (LL.B., 1967, cum laude, law review), and Oxford University (Ph.D., 1972, legal history). Immediately upon graduation from law school in 1967 I was appointed Assistant Professor of Law at the University of Georgia. Thereafter I practiced law in New York, New York with Paul, Weiss, Rifkind, Wharton & Garrison (1969), and in Colorado with Rural Legal Services (1970-71). Subsequently I studied legal history at Oxford University, a world renown center for historical analysis. My thesis, "American Wildlife Law," described the growth of wildlife law from its medieval English roots to its modern formulation. After two years of residence in England, I joined the faculty of the University of Houston College of Law, and thereafter the faculty of the University of Utah College of Law. My Oxford dissertation was published as *American Wildlife Law* (University of California Press, 1980). In reviewing this book the journal "Environmental Affairs" observed: "Thomas A. Lund, a professor of law at the University of Utah, is probably the leading authority on the history of wildlife law."[6]

A Summary of the Discussion

I. Today a landowner might claim to "own" fish and game, but that view confuses his power to exclude trespassers with his lack of power to authorize anyone (himself included) to take fish or game. The state owns wildlife, and no person can take fish or game unless the state allows him to do so. A landowner who takes fish and game on his own land without having a license commits a crime.[7] Furthermore a landowner cannot sell a license to take fish or game; he may sell a grant which purports to convey the right to fish or hunt on his land, but regardless of the words of his grant, his grant can do no more than authorize entry to his land. Whatever authority the entrants enjoy to take fish or game derives only from a state license. A landowner's claim to "own" fish and game has nothing to do with fish and game, but rather simply grows out of his power to exclude trespassers. Furthermore, unless a landowner "posts" his land, state law allows anyone to enter the land to hunt or fish. Thus with regard to unposted land, a person who grants away his land retains unchanged his state authority to take fish and game on that very land.

Contemporary law largely adheres to an American pattern established since colonial times. American law followed the English view that the state owned all the fish

and game on private property. Some Americans debated whether the state could grant specific landowners a monopoly in certain fish populations, but except along the eastern seaboard, states did not create such land based monopolies. All the states allowed landowners to sell rights of access to their property, but no state considered these rights of access to create a right to fish or game.

Both modern and nineteenth century doctrine agree: the landowner has no legal interest in the fish and game on his property. A land grant in the nineteenth century, just like a land grant in the twentieth century, said nothing about fish and game, because a land grant had nothing to do with fish and game. Lawyers in 1855 would not have viewed a grant of land to relinquish a privilege of taking fish and game.

II. In 1837 the Indians had exchanged their aboriginal rights on the ceded territory for a new "privilege" to take fish and game. If that new privilege were viewed as a right, title or interest in land, the 1855 drafters might have understood that the 1837 privilege could be terminated by the Indians' 1855 transfer of all right, title, and interest in land.

The 1837 privilege would not have been viewed as a right, title or interest in land. The 1837 drafters had a choice of a variety of doctrines from English land law to describe the future Indian rights to fish and game, but they chose none of them. The English doctrines would have given the Indians either a monopoly in fish and game, or a right to enter private land. Instead the drafters

chose to create an Indian "privilege," which, like a modern fish and game license, conveys the privilege to take fish or game if the takers can reach the fish or game without committing a trespass. Just as the state conveys no interest in lands when it issues a modern fishing or hunting license, the treaty drafters would not have understood the 1837 privilege to grant the Indians an interest in the lands where they would hunt or fish.

III. The rights the Indians enjoyed in 1837 to enter private lands merit attention. Since the Indians twice relinquished their lands, in 1837 and in 1855, the Indian privilege could hardly have persisted unless the Indians had some opportunity to enter lands that they did not own. Minnesota contained public and private lands in abundance which the Indians could enter. By nineteenth century law a person could enter all wild lands that were neither enclosed nor farmed. Indeed unless private lands were "posted," all were free to enter to take the fish and game there found.

These are the basic points which the following discussion will establish.

* * *

An Outline of the Discussion

I. A Grant of All Right, Title and Interest in Land Does Not Compromise the Grantor's Privilege of Taking Fish and Game.

a. English Common Law.

b. American Common Law.

II. The Treaty Drafters Would Not Have Considered the 1837 Privilege To Be a Right, Title or Interest in Land.

a. An Historical Analysis.
b. A Theoretical Analysis.

III. Public Rights to Enter Wisconsin Territorial Land.

a. Lands Neither Enclosed Nor Farmed.

b. Lands Not Posted.

c. Trespass Quare Clausum Fregit.

Appendix I: A Natural Law View of Indian Rights.

Appendix II: Expert Credentials

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The Discussion

I. A Grant of All Right, Title and Interest in Land Does Not Compromise the Grantor's Privilege of Taking Fish and Game.

The 1855 treaty raises the following question: by American common law does a grant of all right, title and interest in land, that is, a fee simple,[8] compromise the grantor's right to hunt and fish on the conveyed land.[9]

If the drafters are considered legally sophisticated,[10] an interpretation of the instrument calls for the close legal analysis which was characteristic of American law in the early nineteenth century. At the outset the correct body of law to interpret the treaty terminology must be identified. The treaty was consummated in 1855 in Washington, D.C. concerning land in the Minnesota territory. Applying Mr. Justice Story's then uniformly accepted *Commentaries on the Conflict of Laws*,[11] a federal question regarding land

would be resolved in a manner consistent with the law of the situs.[12] Therefore Minnesota territorial law of 1855 governs the interpretation of the term "all right, title and interest in land." In 1849 the Minnesota territorial legislature passed an act (as amended in 1852) "prescribing rules for the Construction of Statutes" which dictated that "[t]he word 'land' or 'lands,' . . . shall be construed to include lands, tenements, and hereditaments, and all rights thereto and interests therein." This Minnesota definition is congruent with the common law,[13] and therefore provides the appropriate entry into the question of whether a grant of "all right, title and interest" in land includes the right to fish and hunt.

In fleshing out the meaning of "lands, tenements, and hereditaments," Minnesota would refer to the rules of the Minnesota common law to explain such cryptic phrases.[14] The Minnesota Territory adopted the uniform American approach which defined the common law by incorporating or "receiving" the English common law.[15] This doctrine transformed English common law into American common law "to the extent such rules were applicable to the new conditions" on the American continent.[16] "Reception" theory requires a two part analysis: first, what was the English common law of "lands, tenements, and hereditaments;" and second, was that English common law "applicable to the new conditions" in America.

a. English Common Law

At English common law a landowner as landowner did not own the fish and game found upon his land.[17] As

Blackstone established, the king owned all fish and game.[18]

While denying a landowner's general right to fish and game, however, English common law recognized certain property rights, "hereditaments," which a landowner could hold in fish and game.[19] These interests were franchises[20] of the forest, chase, park, and free warren;[21] and several, free, or common fisheries.[22] Most distinctions among these interests are not relevant to American landowners' rights to fish and game.[23] The following discussion regarding American reception of English doctrine divides fish and game interests into two categories: interests created by grants by the king,[24] and interests created by grants by private landholders.[25] These two categories, both "hereditaments,"[26] may be described as "rights of ownership" and "rights of access."[27]

"Rights of ownership" had been conveyed by the English king for many centuries.[28] Acting upon the theory that the sovereign owned all game and fish[29], the king had granted interests in game or fish under such headings as "franchises of the chase" and "free fisheries."[30] The holders of these grants had monopoly rights to the subject species.[31] While the franchises were not necessarily granted in connection with a conveyance of land[32] – indeed they could be granted with regard to fish or animals on land the king did not own – nonetheless they might be considered interests in land: if a person who owned both land and a franchise granted the land, the franchise went by implication.[33] Furthermore a franchise to game or fish on another's land authorized the holder to enter that land,[34] and this right of entry was itself an interest in land.[35]

"Rights of access" were another form of common law property; a common law property that was clearly an interest in land. Indeed properly understood rights of access were so completely an interest in land that they were not an interest in fish or game.[36] Although the landowner as landowner had no right to the fish or game on his property,[37] he could control access to that fish and game. By invoking the rules of trespass, he could bar the public from his land:[38] "The common law subjects every person, even a lord of the manor, to an action of trespass for entering the land of another, in order to search for or pursue game, unless he have a free chase or free warren over it . . . " And it was that power of exclusion which created the rights of access: the landowner could sell a right to enter his property, including a right to enter for the purpose of taking fish or game. Like a similar form of property, the easement, once created this right of entry became an interest in land.

b. American Common Law

American common law adopted Blackstone's view[39] that the landowner had no general property right to fish and game found on his land. The courts concluded that the state owned "in trust" all fish and game found on private property.[40] As the Minnesota Court observed in State v. Rodman, "We take it the correct doctrine in this country that the ownership of wild animals, so far as they are capable of ownership, is in the state, not as proprietor, but in its sovereign capacity, as the representative, and for the benefit, of all its people in common." The court continues, "he who takes or kills game had no previous right of property in it, and, when he acquires such right

by reducing it to possession, he does so subject to such conditions and limitations as the legislature has seen fit to impose."[41] As another Minnesota case stated, "wild game, before it is reduced to possession, belongs to the state in its sovereign capacity, in trust for the whole public."[42] As regards the particular English rights of ownership and access, however, American law calls for a more extensive discussion.

Rights of ownership: American law was hostile to the view that the sovereign could create a legal interest in land which included a franchise in fish or game.[43] Despite the English rule creating such property rights, American lawyers condemned them as contrary to the new democratic conditions on the American continent.[44] American courts established canons of construction which made it virtually impossible to conclude that a land grant conveyed or relinquished an ownership interest in wildlife. For example, in Mouton v. Libbey,[45] the court established that "a construction, which would allow a grant of the king to diminish a common right, is to be rejected, unless it be so clearly and fully expressed as to be incapable of any other reasonable construction."[46] On that basis the court denied that the following grant conveyed a private interest in fish: land "together with the fishing of what kinds soever, as well pearls as fish . . . "[47] Arnold v. Mundy[48] denied that the following royal grant transferred a private interest in fish: "all the lands, soils, rivers, waters, harbours, fishings, fowlings, royalties, profits, commodities, and appurtenances in fee simple, together with all the powers of government."[49]

On the basis of such canons of construction, the authoritative Kent Commentaries[50] concluded that rights of

ownership in game simply did not exist in the United States.[51] Rights of ownership regarding fish presented a more complicated problem. Royal franchises to fish within the American colonies had descended through chains of title to private American citizens. Furthermore colonial and state governments on the eastern seaboard had themselves granted private franchises.[52] After decades of dispute which typically concluded that monopolies in game or fish could not exist in the United States,[53] the Supreme Court ruled in Martin v. Waddell[54] that although such rights were not favored, in an unusual case – a genuine grant from the English sovereign, or an unmistakable transfer by an American government[55] – such rights might exist:[56] a citizen might hold a monopoly in some specific fish population. But even in Martin v. Waddell the Court concluded that a grant which spoke expressly of "fishings, hawkings, huntings and fowlings" did not convey such a monopoly.[57] As Chief Justice Taney observed, "Grants of that description are, therefore, construed strictly; and it will not be presumed, that [the king] intended to part from any portion of the public domain, unless clear and especial words are used to denote it."[58] Similarly in Lowndes v. Dickerson,[59] a New York court observed in 1861 that "[G]rants of this description [grants possibly conveying an ownership interest in fish and game] are construed strictly, and an intention to part with any part or portion of such rights will not be presumed 'unless clear and special words are used to denote it.' Martin v. Waddell . . . ' "[60] By using this rule of construction, the court concluded a grant of "fishings, fouling, hunting, hawking" did not convey a proprietary right in fish and game.[61]

The impact of rights of ownership on a Minnesota conveyance: As for game, none of the rights of ownership with regard to game existed within America. As for fish, no evidence appears within Minnesota case law that rights of ownership regarding fish were ever recognized. Asked whether a transfer of land transferred the grantor's franchise, a Minnesota lawyer in 1855 would reply that no one in Minnesota owned a franchise.[62]

Rights of access: American law accepted the English common law doctrine which allowed a landowner by grant to disable himself from bringing a trespass action against a particular person or class of persons. Treat v. Parsons[63] demonstrates a variation on this theme. There the landowner granted the defendant "all the . . . salmon, shad, and alewives, on the whole shore frontage . . . together with all the privileges necessary for carrying on the said fishing." While fishing for such enumerated speices, the defendant also harvested unenumerated species, and the plaintiff sued regarding those unenumerated species. Because the plaintiff had disabled himself from suing for trespass, the court concluded the defendant had a right to the unenumerated species:

> Fish, before they are taken, are the property of no one. When taken, like all animals ferae naturae, they belong to the taker. . . . The defendants have no right to attach to the plaintiff's land fixtures for the express purpose of taking fish other than those mentioned in the grant; but if, having constructed weirs for no other purpose than to take such fish as are named in the grant, they find other fish therein, and are first takers of them, we think such fish become their property, the same as if taken by other means, and

> that the owner of the shore had no property in them.[64]

The landowner could invoke the rules of property law[65] to create interests which authorized entry to fish or hunt on his land. Duncan v. Sylvester,[66] is an 1844 case from Maine which demonstrates the early American recognition of the distinction between rights of access and rights of ownership. There a deed purported to convey "half part of a certain lot or tract of land . . . including the salmon fishery contiguous to said land."[67] The court concluded that all householders in Maine have a common right to salmon, and that the interest conveyed by the "salmon fishery" was only the land based right, an "incorporeal hereditament,"[68] to affix and dry nets on the land. "This is believed to be the foundation, upon which the valuable private rights or privileges of fishery, often conveyed and leased by one to another for no inconsiderable amount of money, rest."[69]

A conveyance of rights of access ordinarily had no consequence regarding the landowner's continuing power to take fish or game.[70] Unless by express agreement the landowner had disabled himself from taking fish and game, he surrendered no such right by conveying a right of access to another.[71] The former owner's privilege to hunt or fish would depend on two considerations: first: his right to enter the land through permission, express or implied, a right governed by trespass law; and second: his privilege in general to take fish or game, a privilege governed by territorial or federal law. If the former owner had access to his granted property under the relevant trespass law, he had the same privilege to take fish and game after the grant as he had before the grant. An

1817 case provides a factual situation which required an analysis of this nature. The plaintiff attempted to exclude defendants from fishing in water which occasionally covered parts or all of an island to which the plaintiff owned the fee. Through careful analysis the court concluded that the plaintiff's patent did not convey ownership of fish found in the waters above his island (i.e., the patent was not a right of ownership). Therefore while the plaintiff had the right to prevent fishermen from using his island for fixing nets (the plaintiff's power as a landholder), the plaintiff had no right to exclude fishermen from taking fish found above his island.[72]

In keeping with this established method of analysis, a Minnesota lawyer of 1855 would conclude that a grant of all right, title and interest in land did not terminate the grantor's privilege to take fish and game on the granted land. Rights of access had no relevance to such a privilege. Where such rights of entry had been sold, the former landowner still enjoyed a privilege to take fish and game if he could enter the land in conformity with territorial trespass law.[73]

In sum then under Minnesota territorial law, a grant of all right, title and interest in land would have no impact upon the Indians' privilege to take fish and game. Apart from its effect upon the grantor's right to enter the granted property, the land transfer within the 1855 treaty was irrelevant to the grantor's privilege to fish or hunt on ceded land. The Minnesota rules match contemporary American law. A land grant in the Minnesota territory would no more include a fish and game provision than would a land grant today. The treaty's silence regarding fish and game is the same silence that characterizes every

land grant. Land grants have nothing to do with fish and game, and they do not include provisions regarding fish and game.

II. The Treaty Drafters Would Not Have Considered the 1837 Privilege To Be a Right, Title or Interest in Land.

In 1837 the drafters created an Indian privilege to take fish and game. That privilege replaced the preexisting Indian aboriginal right. The characterization of that privilege is significant with respect to the 1855 treaty. If the 1837 privilege was understood by the treaty drafters as an interest in land, then the 1855 treaty may have been intended by its American drafters to abrogate the privilege; if the 1837 privilege was not understood to be an interest in land, then the 1855 treaty has no impact upon it.

The question of whether the 1837 drafters intended to create an interest in land can be approached from two different perspectives. First, historically: did the 1837 drafters' use of the term "privilege" indicate they intended to create an interest in land. Second, theoretically: does the 1837 interest demonstrate the abstract characteristics of an interest in land.

a. An Historical Analysis.

Having decided to open the question of Indian rights to fish and game, the 1837 drafters would initially look to the common law to provide the legal doctrines to implement their goals. As has been established, the English

common law collection of fish and game doctrines provided two types of interests in fish and game, and both of these interests were interests in land: the "rights of ownership" and the "rights of access."

From the perspective of the 1837 drafters' apparent goals, both interests in land were defective. The rights of ownership had a major failing: they conveyed a monopoly. To have recognized that the Indians held any of these traditional interests would have been to recognize that the Indians could exclude all other takers from fish and game. That was not the drafters' apparent purpose. It is not likely that they wanted to give the Indians this common law monopoly regarding the fish and game within the territory.

The rights of access had a different failing. To recognize that the Indians held this right would be to authorize the Indians to enter private property within the territory despite the protest of the landowners. That was not the drafters' apparent purpose. It is not likely that they wanted to give the Indians this common law right of entry regarding land either.

Upon these bases the drafters chose to reject the common law doctrines which were interests in land, and instead establish the 1837 privilege, an interest unknown to the common law. This privilege did not provide the Indians a monopoly, nor did it provide them with the authority to trespass on private land. By having rejected the concepts of land law, the drafters chose to create a privilege which was not an interest in land.

2. A Theoretical Analysis.

The drafters of the 1837 Treaty did not intend to convey to the Indians a right, title or interest in land. Instead they likely intended to convey express authority from the federal government to continue taking fish and game, and an immunity from interference with that authority by either state or territorial governments. In its characteristics as an immunity the privilege is not an interest in land, since the immunity addresses only the relationship between different levels of government within the federal system. As an authorization, it cannot be an interest in land if its significant characteristics are identical to other government authorizations which are not interests in land.

The Indian authority although broader in scope and derived from the federal government is analogous to the authority conveyed by a state or territorial fish and game license. As the cases indicate, fish and game license holders enjoy a "privilege" which derives from state police power, not from some interest conveyed by landowners. "By reason of their migratory habits, their ownership is in the whole people of the state, and no individual has a property right in them until they have been subjected to his control. To fish is a privilege accorded by the state, and the question of individual enjoyment is one of public privilege, and not of property right."[74] License holders enjoy no right of entry into private lands. Both Indians and license holders alike have to base their entry upon compliance with trespass law.

Furthermore if the license or the Indian privilege is an interest in land, it must take something from the landowner. License holders and Indians have the identical impact upon landholders. No judicial opinion has ever found that by selling a fish and game license the state "takes" something from the private landholder.[75] The state or territory seeks no agreement from, and pays no compensation to, landowners.[76] In the language of the fifth amendment to the United States Constitution, the privilege "takes" nothing from a landowner.[77] The Indian privilege does nothing different to the landowner. The privilege is not an interest in land.

Finally the Indian interest fails to have the markers of transferability and inheritability which are characteristic of interests in land.[78] With the permission of the United States government, Indians can transfer their interests in lands, and thereafter the interests are inheritable.[79] Under no circumstances can the Indians transfer their privilege to take fish and game; under no circumstances can the privilege be inherited. Therefore the interest is not an interest in land.

On both of these bases, therefore, it is not at all likely that the 1837 or 1855 treaty drafters would have viewed the privilege to take fish and game guaranteed by the 1837 treaty as a "right, title or interest" in land.

III. Public Rights To Enter Wisconsin Territorial Land.

By the 1837 Treaty the Indians ceded the lands they lived on within the Wisconsin Territory. Because they no longer owned land in the ceded territory, the value of their

retained privilege depended upon their authority to enter public and private land which they did not own. Under the doctrines involving choice of law discussed earlier, Indian authority to enter land would be defined by the Wisconsin territorial trespass law of 1837. This authority was extensive. First, no rule restricted hunting and fishing on public lands.[80] Second, private lands were open to hunting and fishing if they were not enclosed or farmed, if they were not posted, or if the owner had not entered upon them.

a. Lands Neither Enclosed Nor Farmed.

Frontier conditions created an American doctrine[81] which permitted entry to undeveloped lands that were neither farmed nor enclosed.[82] As Mr. Justice Holmes observed, "The strict rule of the English common law as to entry upon a close[83] must be taken to be mitigated by common understanding with regard to the large expanses of unenclosed and uncultivated land in many parts at least of this country. Over these it is customary to wander, shoot and fish at will until the owner sees fit to prohibit it."[84] A South Carolina case in 1818 established the right to hunt and fish unenclosed land despite the owner's demand that the entrants leave.[85] "Having come to the conclusion that it is the right of the inhabitants to hunt on unenclosed lands, I need not attempt to prove that the dissent or disapprobation of the owner cannot deprive him of it; for I am sure it never yet entered the mind of any man, that a right which the law gives, can be defeated at the mere will and caprice of an individual."[86]

This alteration in common law policy[87] was consistent with an "increasing preoccupation with using law as an instrument of policy [which is] everywhere apparent in the early years of the nineteenth century."[88] American common law changed English common law in order to achieve two goals: first, to allow the harvest of fish and game in wilderness areas,[89] and second, to prohibit fishing and hunting which would disrupt productive agriculture.

The first statement of this new policy appeared within the Massachusetts Body of Liberties[90], a colonial expression of law[91] which established "And for great ponds lying in common . . . it shall be free for any man to fish and fowl there, and may pass and repass on foot through any man's propriety for that end, so they trespass not upon any man's corn or meadow."[92] As a Massachusetts court observed in 1868, "with this was granted the right of passage even over private lands, excepting only such as were devoted to annual crops."[93] An American commitment to allow entry into private lands was so firm that some argued for its guarantee within the United States Constitution.[94] While this effort failed, the state Constitutions of both Pennsylvania and Vermont contained such guarantees.[95] The Vermont Constitution establishes, "the inhabitants of this state shall have the liberty, in seasonable times, to hunt and fowl on the lands they hold, and on other lands not inclosed . . . "[96]

Ultimately the privilege to enter private lands was created in two parallel contexts: the privilege to hunt and fish on private land, and the privilege to graze domestic stock on private land. As a court observed in 1847, the duty to fence to exclude hunters was "analogous" to the

duty to fence to exclude domestic stock.[97] A description of the grazing privilege also describes the fishing and hunting privilege.[98]

By the English common law the owner of cattle that entered unenclosed land had committed a trespass; such a doctrine would have impeded the use of the American grazing resource. As a court observed, "[C]an it be supposed that when the early settlers of this country located upon the borders of our extensive prairies, that they [adopted] a rule of [the English common] law requiring each one to fence up his cattle? that they desired the millions of fertile acres stretched out before them, to go ungrazed, except as each purchaser from the government, was able to inclose his part with a fence?"[99]

The new American common law rule[100] allowing entry into unfenced property[101] was complemented by statutes such as that enacted in 1838 in the Wisconsin Territory which expressly confirmed the right of entry: "all neat cattle, sheep, horses . . . and hogs, shall be permitted to run at large . . . and the owner thereof shall not be liable . . . unless [damage] be done upon enclosed ground, with a legal and sufficient fence . . . "[102]

The common law rules regarding enclosure were an aspect of a more comprehensive American policy regarding enclosure, a policy described in the widespread statutes which stated the "fence laws."[103] The fence laws explicitly described unenclosed lands as open and common to entry by all.[104]

By the fence laws a person could choose not to enclose or develop his property, but in consequence his land would be open to common entry.[105] Landowners chose this

approach in order to avoid liability for the costs of a partition fence built by an adjacent landowner. By the fence law, once a landowner developed or enclosed his land, he became liable for a share of such fences. As the Wisconsin Territorial Statutes explained, "Where the lands or meadow of any two or more persons shall adjoin each other, each of them shall make and maintain a just proportion of the division or partition fence between them, except such persons as shall choose to let their lands or meadows lay vacant and open . . . "[106] In a fence law jurisdiction by statute unenclosed land was land open to common activities.[107]

b. Lands Not "Posted."

In conjunction with a new doctrine of enclosure, American courts also created new law regarding the presumption of consent in trespass cases. Within England an entrant might answer a trespass action by asserting he entered under the authority express or implied of the owner. With regard to undeveloped lands American courts expanded this rationale by creating a presumption that an owner gave authority for noninjurious entry unless he expressly withdrew that authority.[108]

A clear statement of the posting doctrine appears within a Michigan case.[109]

> "Per Curiam. The small lake or pond on which the alleged trespass was committed was almost entirely enclosed within the lines of plaintiff's farm. Whatever question might arise respecting the right to exclusive fisheries in larger bodies of water, the right of the land-owner to the

> exclusive control of small bodies thus situated would seem clear.
>
> "It has always been customary, however, to permit the public to take fish in all the small lakes and ponds of the State, and in the absence of any notification to the contrary, we think any one may understand that he is licensed to do so. No such notification appears in this case, and we therefore hold that the defendant was not a trespasser in passing upon plaintiff's land with the intent to take fish, having no knowledge that objection existed to his doing so.
>
> "Judgment reversed with costs of this court."

Posting, or more broadly, taking steps to contradict the presumption of permission regarding wild lands, is a privilege, because a landowner thereby withdraws from the presumption of consent which otherwise applies to his undeveloped property.[110] This landowner privilege is discussed in early South Carolina cases in which the landowner expressly withdrew his consent.[111]

The landowner privilege does not invariably exist. The fence laws deny such a privilege: either an owner fences his property, or his property is open to all, regardless of his attempt to discourage entry by means less than a "legal and sufficient" fence.[112]

Furthermore the landowner privilege which exists with regard to unenclosed lands may in certain situations become an obligation with regard to enclosed lands. That is, even though lands are enclosed and developed, they are free to entry if they are put to a use which would not be disrupted by fishing or hunting. Within the Wisconsin

territory, for example, unless an owner posted his unoccupied fenced grazing land, that land would have been open to hunting and fishing. Early nineteenth century Wisconsin statutes indicate entry to fenced or farmed property was proper so long as the entrant did no damage.[113]

c. Trespass Quare Clausum Fregit.

Frontier states might include substantial areas technically in private ownership, but in fact not yet occupied by their owners. Land speculators, timber companies, and railroads, for example, might acquire title to vast tracts, but remain owners of these areas for years without ever in fact entering the properties. The common law of "trespass quare clausum fregit" held these lands open to entry for fishing and hunting.

In keeping with the uniform rule for common law jurisdictions in 1837, Wisconsin defined its substantive law of trespass according to the "forms of action." A Wisconsin territorial court in 1837 would entertain only those complaints which were formulated in compliance with one of a limited group of "actions." To establish a legal wrong, a person had to show that his claim contained all the carefully defined "elements" of a particular action. There was no general substantive law in the early nineteenth century; instead the substantive doctrines of the law were found exclusively in each of the particular "forms of action." If a plaintiff could not establish every element of a particular writ, he had suffered no wrong. As the prominent scholar Maitland observed, the plaintiff "may find that, plausible as his case may seem, it just will not fit any

one of the receptacles provided by the courts and he may take to himself the lesson that where there is no remedy there is no wrong."[114] As the United States Supreme Court expressed the concept, "The ideas of right and remedy are inseparable. 'Want of right and want of remedy are the same thing.' "[115]

Trespass quare clausum fregit ("trespass wherefore he broke the close") was the common law action for damages for an unlawful entry upon the plaintiff's land. While other trespass writs were available to try title ("trespass to try title"), or to redress negligence ("trespass on the case"), or to redress personal injury ("trespass vi et armis"), trespass quare clausum fregit (trespass q.c.f.) was the only legal action a landowner could use to recover damages for an improper entry. Whether an entry to land was wrongful depended upon whether the landowner could establish all the necessary elements of trespass q.c.f. Or, to approach the problem from the entrant's perspective, an entrant had a legitimate right to enter land if his entry did not contravene all the elements of the trespass q.c.f. writ.

Even though a person had title to land, he could not bring trespass q.c.f. until he had entered and taken possession of the land. As Blackstone pronounced, "[B]efore entry and actual possession, one cannot maintain an action of trespass, though he hath the freehold in law."[116] The same uncontroverted view appears within an American law text of 1833: "The *gist* of this action is the injury to the *possession*; and the general rule is, that unless at the time the injury was committed the plaintiff was in actual possession, trespass cannot be supported . . . "[117]

By this doctrine Wisconsin law in the late 1830s and 1840s permitted hunting and fishing on unoccupied private lands. As a Wisconsin court observed in 1845, " 'only the person who has possession in fact of real property to which an injury has been done, can maintain an action of trespass *quare clausum fregit;* a general property not being in the case of real property, as it is in the case of personal, sufficient to found this action upon.' After entry the owner may have trespass *quare clausum fregit,* but not before."[118]

Appendix I: A Natural Law View of Indian Rights.

Many protective doctrines instruct courts to consider Indian treaties with reference to the Indians' lack of sophistication regarding complex legal systems. As a people not educated within a European culture, the Indians were not sensitive to the nuances of the common law. A portrait of the actual Indian understanding of these doctrines is not within the range of this report. Nonetheless many American legal discussions disclose a sensitivity to a "natural law" approach to the question of title to fish, game, and land. A brief discussion of that learning may be appropriate here.

Although the American common law ultimately assigned "ownership" of wildlife to the state, for centuries commentators had described wildlife as in fact "the property of no one."[119] This was the "natural law" view of rights to wildlife, a natural law view which allowed everyone without reference to their station in life, their wealth, or their ownership of land to take the natural bounty spread before one and all by the Creator. This was not the

strange view of some wild philosopher;[120] this was a view enunciated in the American legal decisions of the nineteenth century.[121] As a Georgia state court observed, the nation "was but one extended forest, in which the liberty of killing a deer, or cutting down a tree, was as unrestrained as the natural rights of the deer to rove, or the tree to grow."[122] This "res nullius" theory was a thread drawn by the common law from the far more ancient Roman law system.[123] If respectable American courts, common law commentators, and the profound formulators of Roman law all could describe wildlife as the property of no one, the Indians can be forgiven a comparable view. And those who held to such a theory would consider the 1855 transfer of "all right, title and interest" in land completely unrelated to the transferor's interest in wildlife. A Georgia judge, a Roman, a common law scholar, and an Indian all might transfer land in complete confidence that the transfer had no impact upon their rights to take wildlife.

Appendix II: Expert Credentials.

Thomas Lund

Born: 1942, New York, New York.

Education: Oxford, Ph.D.,1978; Columbia, LL.B.,1967 (cum laude,law review); Harvard, B.A.,1964 (cum laude).

Faculty Appointments:

University of Utah College of Law, Professor since 1979; Visiting Professor, 1978-79.

University of Houston Law Center, Professor, 1977-79; Associate Professor, 1974-77.

University of Georgia, School of Law, Assistant Professor, 1967-69.

Law Practice:

Colorado Rural Legal Services, 1970-71. Paul, Weiss, Rifkind, Wharton & Garrison (New York), 1969.

Publications:

Book: *American Wildlife Law*, University of California Press, 1980.

Articles:

1. A Brief History of U.S. Wildlife policy, Conference Proceedings, First International Wildlife Management Conference, San Jose, Costa Rica (1993).

2. Book Review, Tawfik al-Hakim, Maze of Justice, 1991 Utah Law Review 933 (1991).

3. The Modern Challenge of Medieval Conflict of Laws, 48 Washington and Lee Law Review 307 (1991).

4. Book Review, McEvoy, The Fisherman's Problem, American Historical Review (April 1988 at 491).

5. The Modern Mind of the Medieval Lawyer, 64 Texas Law Review 1267 (1986).

6. Confessions of a Medieval Jewish Lawyer, 1986 Utah Law Review 231 (1986).

7. Early American Wildlife Law, 51 New York University Law Review 703 (1976).

8. British Wildlife Law before the American Revolution, 74 Michigan Law Review 49 (1975).

9. Consent Searches, 67 Columbia Law Review 130 (1967) (student work).

10. Felony Murder, 65 Columbia Law Review (1965) (student work).

Speeches:

1. A Brief History of U.S. Wildlife Policy, First International Wildlife Management Conference, San Jose, Costa Rica, September, 1993.

2. The Development of Wildlife Law to Missouri v. Holland, Eighteenth Annual National Archives Conference (New Historical Perspectives and Resources), Washington, D.C.,1978.

3. A Humanistic Perspective on Wildlife Law, Association of American Law Schools, 1976.

Committees: Faculty Recruitment (chair, one year); Admissions (chair, four years); Curriculum (chair, two years); Tenured Faculty Review (chair, one year); Readmissions (chair, one year); Library (chair, one year); Dean Search (Utah and Houston); University Promotion and Tenure Advisory Committee (1991-1993).

Awards: Burlington Northern Outstanding Teacher Award, 1988.

ENDNOTES

1. Wilkinson & Volkman, "Judicial Review of Indian Treaty Abrogation" 63 Cal. L. Rev. 601 (1975).

2. F.W.Maitland, The Forms of Action at Common Law 4-5 (1936 ed.).

3. "[A]t any given period the courts could administer only the law of the time being; and as, at any stage of

legal development, every proposition of law theretofore established had found expression in some writ, the whole body of accepted jurisprudence was embodied in the Register [of Writs]. Want of remedy was, therefore, quite reasonably synonymous with want of right." Edwards v. Kearney, 96 U.S. 595.

4. "In the history of American institutions, no other book – except the Bible – has played so great a role as Blackstone's Commentaries on the Laws of England." D. Boorstin, The Mysterious Science of the Law iii (Peter Smith, ed. 1973).

5. See generally, S. Kimball, Historical Introduction to the Legal System 263-309 (1966).

6. 9 Environmental Affairs 499 at 502.

7. See, e.g., Leger v. Louisiana Department of Wildlife, 306 So. 2d 391 (La.1975).

8. By definition the common law's most extensive interest in land. "The estate which a man has where lands are given to him and to his heirs absolutely without any end or limit put to his estate." 2 Blackstone Commentaries 106.

9. If the 1837 privilege defines the Indians' interest in fish and game, then an analysis as to whether a grant of land eliminates "common law rights" is somewhat beside the point. In any case the following discussion provides some important background information.

10. Because nineteenth century conditions regarding medicine, transportation, and communication were primitive, a tendency may exist to consider nineteenth century skills of legal analysis undeveloped. A comparison of

past with present analysis (for example, Blackstone and Kent compared to the modern restatements) will demonstrate that the eighteenth and nineteenth century commentators have only been equalled, never surpassed. Furthermore the subject treaties involved federal rights affecting the use of well over twenty million acres of land. It is no fanciful hypothesis to believe the United States sought competent advice in drafting the instruments.

A study of legal skills on the frontier from 1805 to 1836 observes that even beyond or just within the line of settlement "One looking for Frontier influence will find instead of evidence of 'rough and ready justice' long and complicated equity bills many of them containing all the features of the classical English bills, and one, at least, running more than 100 pages; complicated answers under oath many involving full discovery; extensive use of masters in chancery; carefully-drawn chancery decrees. . . . With only two or three exceptions, the judges of the territorial Supreme Court were well-educated lawyers, and [at all times] adequately trained lawyers were members of the bar." Blume, Chancery Practice on the American Frontier, 59 Mich. L.Rev. 49, 95-96 (1960).

With regard to the legal sophistication of the Indian parties to the treaty, see Appendix I.

11. See Reese, Rosenberg, Hay, Conflict of Laws 4-5 (1990).

12. According to the common law, "the law of the situs shall exclusively govern in regard to all rights, interests, and titles, in and to immoveable property." Joseph Story, Commentaries on the Conflict of Laws 390 (Boston 1834)

(Reprinted in American Law: The Formative Years, Horowitz and Katz, advisory editors, 1972). An alternative choice of law rule analysis suggests that since the interests in fish and game are not interests in land, the choice of lawrule regarding land is incorrect. Story's other rules, however, all point to Minnesota. If the question is one of a contract, Story observes, "But where the contract is either expressly or tacitly to be performed in any other place, there the general rule is, in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance." ibid. 233. Finally if the question concerns personal property, "the laws of the owner's domicile should in all cases determine the validity of every transfer, alienation, or disposition made by the owner, whether it be inter vivos or post mortem." ibid. 315.

Nothing in Story's Commentary indicates a treaty should be governed by a special rule; and even if there were a special rule for treaties, that rule, in conformity to all the other applicable rules, would probably point to Minnesota.

13. "Things real consist of lands, tenements, and hereditaments. The last word is almost as comprehensive as property, for it means anything capable of being *inherited*, be it corporeal, incorporeal, real, personal, or mixed." 3 Kent Commentaries * 401, citing Co. Litt. 6, a. Corporeal hereditaments include "not only the ground and soil, but everything which is attached to the earth . . . " ibid. *401. "Incorporeal tenements and hereditaments comprise certain inheritable rights, which are not, strictly speaking, of a corporeal nature, or land, although they are, by their

own nature, or by use, annexed to corporeal inheritances, and are rights issuing out of them, or concern them." Ibid *401-02.

Some debate might address the precise method that Minnesota would use to reach the standard common law definition of lands, but all the approaches would eventually reach that definition. The Minnesota Territorial definition applies to questions concerning the "construction of statutes." Minnesota Territorial Statutes 1849, chapter 3, section 1. If a court chose not to apply this rule (construction of "statutes") to the interpretation of a treaty, then a court would instead apply the general Minnesota Territorial law regarding the question. The Minnesota Territorial law was the Wisconsin Territorial Law at the date Wisconsin was admitted as a state to the Union. Organic Act of Minnesota, 1849, section 12. Wisconsin adhered to the standard statement of the common law. (Coburn v. Harvey, 18 Wis. 156 (1864)). Therefore the Kent definition would be correct, the Kent definition which matches the Minnesota Territorial statutory construction definition.

14. "[T]he common law of a state which had no political existence before the revolution, is the common law as modified and amended by English statutes passed prior to our revolution. This definition, of course, has no reference to such portions of the common law as are inapplicable to a given state, or to any changes or repeals which may have been effected by legislation of such a state." Dutcher v. Culver, 24 Minn. 584, 591 (1877) referring to Coburn v. Harvey, 18 Wis. 156 (1864). "[Q]uestions of property, not clearly excepted from [the common law by

statutory enactment], must be determined by the common law, modified only by such circumstances as render it inapplicable to our local affairs." Coburn v. Harvey, 18 Wis. 156 (1864) quoting Lorman v. Benson, 8 Mich. 25. See Sullivan, *The History of Land Titles in Massachusetts*, Prefatory Address, Common Law 17-18: "Our constitution and laws provide for process and trial by grand and petit jury; but we must recur to the Common Law, to know what a jury is. . . . Our statutes provide for the punishment of murder, and other crimes; but the definitions of these are found only in the ancient precedents."

15. See generally, S. Kimball, Historical Introduction to the Legal System 263-309 (The "Reception" of English Law) (1966).

16. See James Kent, 1 Commentaries on American Law 473-74 (1835) ("[T]he common law, so far as it is applicable to our situation and government, has been recognized and adopted . . . by the courts of justice, or declared by statute . . . as the law of the land in every state." See also, e.g., Dutcher v. Culver, 24 Minn. 584 (1877), Coburn v. Harvey, 18 Wis. 156 (1864). The English game laws were not applicable to the new American situation. State v. Campbell, 1 T.U.P.Charlt. 166 (Ga. 1808). As Mr. Justice Holmes observed, the American adoption of English common law "is far from meaning that patentees of a ranch on the San Pedro are to have the same rights as owners of an estate on the Thames." Boquillas Land & Cattle Co. v. Curtis, 213 U.S. 339, 345 (1909) (Justice Holmes).

17. See generally Appendix II.

18. 2 Blackstone *14,*15,*391,*394,*413,*419; 4 Blackstone *174, *415. Chitty observes "[m]ost of the writers on

general law assert the sovereign has the sole *property* in game . . . " 1 Chitty, The Game Laws 2. Prof. Christian attacked this position in his Treatise on the Game Laws. As an academic matter, the debate regarding the English view of the landowner's general property in fish and game upon his land may provide some interest. See T. Lund, American Wildlife Law 21-24 (1980). But in America without question Blackstone's position prevailed, although American decisions often added the caveat that the sovereign held fish and game "in trust" for the public. See Geer v. Connecticut, 161 U.S. 519 (1896); Lawton v. Steele, 152 U.S. 133 (1893); Arnold v. Mundy, 6 N.J.L.l (Sup.Ct. 1821); State v. Rodman, 58 Minn 393, 59 NW 1098 (1894).

19. All of the discussion refers to wildlife which has not been captured and confined. Of such captured and confined fish and game, Kent observed, "So, also, it is understood that pigeons in a pigeon house, deer in a park, and fish in an artificial pond, go with the inheritance as heirlooms of the heir." James Kent, II Commentaries 342 (1835).

20. 1 Joseph Chitty, A Treatise on the Game Laws, and on Fisheries 14 (London, 1812) (reprinted in the Garland Publishing Series Classics of English Legal History in the Modern Era. One Hundred and Forty-two Rare and Important Titles Selected by David S. Berkowitz and Samuel E. Thorne): "A franchise is defined to be a royal privilege, or branch of the royal prerogative subsisting in the hands of a subject by grant from the king. A forest is the highest franchise relating to game, a free chase is the next in degree, a park the next, and the last a free warren." (hereinafter Chitty, The Game Laws).

21. See 1 Chitty, The Game Laws 14.

22. See 1 Chitty, The Game Laws 280.

23. "[T]hese distinctions between common of piscary, free fishery, and several fishery, seem to be quite unsettled in the books; and the authorities . . . throw embarrassment in the way of the attempt to mark with precision the line of discrimination between the several rights of fishery." III Kent, Commentaries 410 (1835). ibid. 411. Chancellor Kent further observes: "[T]he more easily and intelligible arrangement of the subject would seem to be, to divide the right of fishing into a right common to all, and a right vested exclusively in one or a few individuals."

24. In his capacity as a sovereign, not in his capacity as a landholder.

25. In a capacity as a private landholder, not in a capacity as holder of a royal grant.

26. Inheritable interests in land.

27. Nineteenth century commentators such as Kent and Chitty adopt the terminology "hereditaments."

28. Royal rights to fish in navigable waters presented a controversy in both England and America. Many contended that the Magna Charta had eliminated the king's right to grant ownership of fish in navigable waters. See, e.g., Collins v. Benbury, 27 NC (5 Ired) 118, 126 (1844).

29. Blackstone concluded that the king's ownership of game originated in the Norman conquest of 1066. 2 Blackstone *415. As Blackstone observed, "[T]he property of

such animals *ferae naturae*, as are known by the denomination of *game*, with the right of pursuing, taking and destroying them . . . is vested in the king alone, and from him derived to such of his subjects as have received the grants of a chase, a park, a free warren, or a free fishery." 2 Blackstone *410. Maitland read Bracton, the premier medieval authority, to agree with Blackstone: "[I]t is very hard to read [Bracton's] text without believing him to hold that, if franchises conceded by the king be left out of account, every wild animal, bird, fish belong to the king." F.W.Maitland, Bracton and Azo 103. Regardless of the debate concerning the full extent of the king's ownership, all conceded the king's authority to grant franchises regarding certain species or populations of species as to which his ownership rights were beyond question.

30. "The books speak likewise of a free fishery, as being a franchise in the hands of a subject existing by grant or prescription, distinct from an ownership in the soil. It is an exclusive right, and applies to a public navigable river, without any right in the soil. There is also a several fishery, which is a private exclusive right of fishery in a navigable river or arm of the sea, accompanied with the ownership of the soil." III Kent Commentaries 409-10.(1835).

31. II Blackstone 417.

32. II Blackstone 416.

33. See Co. Litt. 4b; Jackson v. Halstead, 5 Cow. 219 (N.Y.).

34. "[T]he occupier may prohibit everyone, except the owner of a chase, or free warren, from sporting over his grounds . . . " 1 Chitty, The Game Laws 29.

35. See 2 W.Blackstone Commentaries * 415.

36. This analysis conforms to that of Chitty, The Game Laws. "[I]t should seem that, in strictness, when a party is owner of the soil, he cannot by that claim a fishery over it by the name of a several fishery, though he will, as owner, have the general right of fishing over it, the same as he may exercise every other right of ownership over his own land, and may complain of an entry on his close covered with water." ibid. 283. "The exclusive liberty of fishing appertaining to a man who is owner of the soil, is distinguishable from other descriptions of fisheries, and may, as it is said, be called praedial, or territorial fishery, instead of several fishery, since this more clearly ascertains its character, as being originally a profit or advantage incidental to the soil, which the owner had always a power to appropriate exclusively to himself, as being on his own land, for cujus est solum, ejus est usque ad coelum. And it has been insisted, that a person cannot be entitled to a several fishery in his own soil, because it must be merged and extinguished in consequence of the unity of ownership . . . " ibid. 281-82.

37. In a small percentage of cases, however, he could rely upon a royal franchise, a hereditament of ownership. In the more typical case, he might justify his taking of fish or game upon some general legislation authorizing taking fish or game, but that general legislation would not grant him any particular authority with regard to the fish or game on his own land.

38. 1 Chitty, The Game Laws 6.

39. "Blackstone was more than a legal writer of note; he was the English common law incarnate. The language of the [Northwest] Ordinance, of the Constitution, of the acts and ordinances of Territorial legislators and jurists everywhere, is incomprehensible if taken in opposition to the spirit of Blackstone." J. Smurr, Territorial Jurisprudence 439 (1970). As the Connecticut authority Swift observed, reception of English law included not only cases, but also treatises such as Blackstone's Swift continues, "no writer on law has acquired greater distinction than Sir William Blackstone. He has reduced order out of chaos, and in his commentaries, exhibited a compleat system of the law of England." Swift, A System of the Laws for the State of Connecticut, 40-47 (1795).

40. See, for example, Geer v. Connecticut, 161 U.S. 519 (1896); Lawton v. Steele, 152 U.S. 133 (1893; Arnold v. Mundy, 6 N.J.L. 1 (Sup.Ct. 1821); State v. Rodman, 58 Minn.393, 59 NW 1098 (1894). The standard articulation regarding fish, for example, is stated in the West Century Digest as follows: "Fish are ferae naturae, and, as far as any right of property in them can exist, it is in the public, or is common to all, until they are taken and reduced to possession. Ind. 1868 Gentile v. State, 29 Ind. 409 (1868); Me 1892; Treate v. Parson, 84 Me. 520, 24 Atl 946; Mich. 1884, Lincoln v. Davis, 53 Mich 375, 19 N.W. 103, 51 Am Rep. 116; Mo. 1885, State v. Blount, 85 Mo. 543."

41. State v. Rodman, 58 Minn 393 (1894).

42. State v. Chapel, 64 Minn 130, 66 NW 205 (1896).

43. For example, "The idea of an exclusive grant to fish in any part of the sea, that must destroy the common right, cannot be received." Moulton v. Libbey, 37 Me. 472, 486. (1854)

44. See 3 N.Dane, General Abridgement and Digest of American Law 136 (1824) (the king's prerogative rights to wildlife do not extend to the American colonies). The English policy restricting taking was described as "contrary to the spirit of our institutions." Hallock v. Dominy, 14 N.Y. Sup.Ct. (7 Hun.) 52, 55 (1876). Some degree of modest resentment may have lingered from the English practice of sentencing those who broke into an enclosure to take deer to seven years transportation to the colonies. 5 Geo. 1, c. 28, s. 1 (1719). See also 10 Geo. 2, c. 32, s. 7 (1737).

45. 37 Me 472 (1854).

46. Ibid. 488.

47. Ibid. 474.

48. 6 NJ Law (1 Halst.) 1 (1821)

49. Ibid. 42.

50. Mr. Justice Holmes had served as editor of the twelfth edition.

51. "The incorporeal hereditaments which subsist by our law are fewer than those known and recognized by the English law. We have no such rights as . . . franchises of the chase . . . " 3 Kent Commentaries *402-03.

52. Three state cases confirming the authority of states to grant monopolies in fish are Bennett v. Boggs, 3 F.Cas.

221, 228 (C.C.N.J.1830), Chalker v. Dickinson, 1 Conn. 382, 384 (1815), and Nickerson v. Brockett, 10 Mass. 212 (1813). Monopolies were sold in the Massachusetts Bay Colony. [1754-55] Mass. Province Laws, 4th Sess., ch.31, sec.4, in 3 Acts and Resolves of the Province of the Massachusetts Bay 809 (1878).

53. E.g., "The great purpose of [the Massachusetts Body of Liberties] was to declare a great principle of public right, to abolish the forest laws, the game laws, and the laws designed to secure several and exclusive fisheries, and to make them all free." West Roxbury v. Stoddard, 89 Mass. (7 Allen) 158, 165 (1863).

54. 41 U.S.(16 Pet.) 367 (1842).

55. See Bennett v. Boggs, Fed.Cas. No 1,319 (Baldw. 60) (1830).

56. ibid. 413-14.

57. Martin v. Waddell, 41 U.S. (16 Pet.) 367, 416 (1842).

58. ibid. 410.

59. 34 Barb. 586 (N.Y. 1861):

60. Lowndes v. Dickerson at 593 (citation in text omitted).

61. ibid. 591.

62. The Minnesota lawyer would thereby simply reflect the analysis which was propounded in an 1878 case from Ohio, Sloan v. Biemiller, 34 Ohio St 492 (1878). There through a private grant a party had purported to retain an ownership interest in fish within a navigable waterway. The court ignored the purported reservation,

because such a grant could not "abridge the rights held by the grantee independent of the deed, nor [could it] enlarge the rights of the grantor beyond what they were before the execution of the deed. The attempted reservation . . . of the right of fishing . . . is therefore inoperative." ibid. 515. Rights of ownership in fish and game no more existed in the Minnesota territory than they did in the state of Ohio.

63. 84 Me 520, 24 Atl 946 (1892).

64. ibid.

65. In conformity with the parallel doctrine of easements, however, these rights of access did not come into existence until the landowner took the appropriate steps to create them.

66. 24 Me (11 Shep) 482 (1844)

67. ibid. 486.

68. ibid. 487,

69. ibid. 486.

70. "The owner of a territorial fishery, so to speak, may either make a grant and thereby exclude himself, or he may permit another to enjoy a coextensive or limited right of fishing in his own water, still reserving his ownership." Woolrych, Waters 89.

71. If the Indians prior to 1855 had granted away lands but had expressly reserved a right to enter those lands to take fish and game, these interests in land would have been hereditaments of access. Some courts concluded that such a hereditament could not be held in gross, that is, could not be held separate from the ownership of a dominant estate. See M'Farlin v. Essex Co., 10 Cush. 311 (Mass.). The question is not important: no evidence appears within Minnesota law that the Indians had created such hereditaments.

72. Brink v. Richtmyer, 14 Johns 255 (N.Y. 1817).

73. Excluding the most unusual case where the landowner had conveyed an exclusive right to fish and game to his grantee. In such cases, because of his express agreement, the former landowner would be barred from taking the fish and game. The 1855 treaty involves no such express agreement.

74. People v. Brooks, 101 Mich. 98, 59 NW 444 (1894) quoting People v. Collison, 85 Mich 105, 48 NW 292. See also State v. Roberts, 59 NH 256 (1879), Hooker v. Cummings, 20 Johns 90 (N.Y. 1822).

75. On the contrary, the state can restrict land development for the benefit of fish and game without such restriction amounting to a taking. In 1841 it was held that the state interest in fish allowed the uncompensated destruction of a dam which disrupted fish populations. Peables v. Hannaford, 18 Me (6 Shep) 106 (1841).

76. Take limitations "deprive no person of his property, because he who takes or kills game had no previous right of property in it, and, when he acquire such right by

reducing it to possession, he does so subject to such conditions and limitations as the legislature has seen fit to impose." State v. Rodman, 59 NW 1098 (Minn. 1894). See also Organ v. State, 56 Ark 267, 22 S.W. 840; Magner v. People, 97 Ill. 320; American Exp. Co. v. People, 133 Ill. 320, 64 NE 758; Gentile v. State, 29 Ind. 415; Phelps v. Racey, 60 NY 10.

77. The question can also be stated from the opposite approach: the state's prohibition against fishing and hunting does not "take" anything from the owner of the land upon which the fish and game are found. "In Thomas v. Northern Pacific Express Co., 73 Minn 185 . . . it was held that the title to wild game caught or killed in a manner prohibited by the statute remains the property of the state, and may be reclaimed by the state, and that no person can acquire title to wild game except by catching or killing it at the time and in the manner authorized." Linden v. McCormick, 96 NW 785 (Minn 1903).

78. The essence of the common law interest in land described as a hereditament is its inheritability.

79. See, e.g., James Kent, III Commentaries 386 note (a) (14th edition, New York).

80. A wildlife taker on public lands takes nothing from public lands because fish and game are not part of the land, and entry is permitted absent contrary notification. But even as to theft of resources from public land, frontier policy resisted regulation. In the nineteenth century "sawmills operated in Minnesota for eleven years before an acre of public land was sold. A few weak efforts to prosecute trespassers were bitterly and successfully

fought. Absentee owners were similarly plundered. No remedy was effective because people on the timber frontier were united against any regulation, and they carried the day. When some prosecutions had been initiated by the reformer Secretary of the Interior Carl Schurz in the 1870's, Congress in 1878 refused to appropriate funds for regulating timber cutting on public lands." G. Coggins, Cases and Materials on Public Natural Resources Law 105.

When statutes were finally passed governing entry, these statutes confirmed that fishing and hunting were permitted. The National Forest Organic Act of 1897 allows "all persons" to enter national forests "for all proper and lawful purposes." 16 USC § 478 (1982). The Taylor Grazing Act states that none of its provisions concerning public lands shall be "construed as in any way altering or restricting the right to hunt or fish within a grazing district in accordance with the laws of the United States or of any state, or as vesting in any permittee any rights whatsoever to interfere with hunting or fishing within a grazing district." 43 U.S.C. § 315 (1976).

81. Contrary to the English doctrine which did not address whether lands were farmed, enclosed, or posted. The English doctrine was not, in the phrase invariably used in reception cases, "applicable to the new conditions."

82. Even this statement of neither "enclosed nor farmed" restricts the entrant more closely than the probable doctrine of Wisconsin in 1837. Thus Wisconsin in 1838 imposed penalties upon those who "shall maliciously throw down or open any bars, gate or fence and leave the

same down or open . . . " Statutes of the Territory of Wisconsin, An Act to provide for the punishment of offenses against private property, section 36, page 356 (1838-39). By implication entry into and across agricultural land was proper where done in a manner that caused no injury.

A rule of reason must have been applied: where a reasonable person believed he could enter agricultural lands without thereby disrupting the agricultural activities, such entry was proper, unless the landowner had expressly withdrawn his consent. Such seems to be the rule drawn by the Massachusetts Body of Liberties. In interpreting the rule, a court concluded entry was appropriate except where the land was devoted to "annual crops." Inhabitants of West Roxbury v. Stoddard, 89 Mass (7 Allen) 158 (1863).

83. Mr. Justice Holmes' observation about the strictness of the common law may require some modification. Blackstone believed certain entries to be permissible: "Also it hath been said, that by the common law and custom of England the poor are allowed to enter and glean upon another's ground after harvest, without being guilty of trespass: which humane provision seems borrowed from the mosaical law. In like manner the common law warrants the hunting of ravenous beasts of prey, as badgers and foxes, in another man's land; because the destroying such creatures is said to be profitable to the public." III Blackstone *212-13. American policy towards Indian hunting, fishing, and gathering appears to have paralleled in some respects the rights of gleaners. Black's Law Dictionary defines "gleaning" as "the gathering of

grain after reapers, or of grain left ungathered by reapers."

84. McKee v. Gratz, 260 U.S. 127, 136 (1922) (Holmes, J.) Mr. Justice Holmes also enunciated this view while on the Massachusetts bench. See Packard v. Ryder, 144 Mass 440, 11 NE 578 (1887) ("It is now well settled that there is a public right to take shell-fish . . . within one hundred rods of the upland, until the flats are inclosed by the proprietor." (Holmes, J.)

85. M'Conico v. Singleton, 2 Mill Const. 244 (S.C. 1818). Two decades later the South Carolina court described the issue in the following terms: "In these cases, it is conceded that no such right [to hunt on another's land] exists by the common law of England; but it is said to have become a right, by the immemorial usage of the State, commencing with its earliest settlement, common to all the people to hunt on unenclosed grounds. The exact meaning of these words, or what kind of enclosure shall exclude the right of the hunter, is perhaps very difficult to define." The court then concluded that a hunting preserve which consisted of an island surrounded by a navigable stream was enclosed. Fripp v. Hasell, 1 Strob. 173 (S.C. 1847).

86. Ibid.

87. "[I]t is conceded that no such right [to hunt on another's land] exists by the common law of England; but it is said to have become a right, by the immemorial usage of the State, commencing with its earliest settlement, common to all the people to hunt on unenclosed ground." Fripp v. Hasell, 1 Strob. 173, 175 (S.C. 1847). In certain situations, however, the English common law did

in fact permit entry into private lands for hunting. Blackstone observes, "the common law warrants the hunting of ravenous beasts of prey, as badgers and foxes, in another man's land; because the destroying of such creatures is said to be profitable to the public." III Blackstone *213. But Blackstone qualifies this right to limit the damage thereby done, a qualification in direct parallel to the developments in American common law: "So also in the case of hunting the fox or the badger, a man cannot justify breaking the soil, and digging him out of the earth; for though the law warrants the hunting of such noxious animals for the public good, yet it is held that such things must be done in an ordinary and useful manner . . . " Ibid. *213-14.

88. "By 1820 the process of common law decision making had taken on many of the qualities of legislation. As judges began to conceive of common law adjudication as a process of making and not merely discovering legal rules, they were led to frame general doctrines based on a self-conscious consideration of social and economic policies." Morton J. Horwitz, The Transformation of American Law 1780-1860 at 2 (1977).

The rejection of the English test of navigability, the ebb and flow of the tide, was motivated by a common sense appraisal of wise policy for the continent. The Northwest Ordinance not only allowed use of the navigable waters, but also "the carrying places between the same." Ordinance of Congress 1787, Article IV. Minnesota also rejected the common law navigability test. Lamprey v. State, 53 NW 1139, 18 L.R.A. 670.

89. The concept was expressed forcefully in M'Conico v. Singleton, 2 Mill 244, 244-45 (S.C. 1818): "Until the bringing of this action, the right to hunt on unenclosed and uncultivated lands has never been disputed, and it is well known that it has been universally exercised from the first settlement of the country up to the present time; and the time has been, when, in all probability, obedient as our ancestors were to the laws of the country, a civil war would have been the consequence of an attempt, even by the legislature, to enforce a restraint on this privilege. It was the source from whence a great portion of them derived their food and raiment, and was, to the devoted huntsman, (disreputable as the life now is,) a source of considerable profit. The forest was regarded as a common, in which they entered at pleasure, and exercised the privilege; and it will not be denied that animals, ferae naturae, are common property, and belong to the first taker. If, therefore, usage can make law, none was ever better established."

The presumption of consent is critical to a democratic policy regarding fishing and hunting. Theodore Roosevelt argued against allowing a system of private game preserves to develop in the United States. In 1893 he observed "I should very much regret to see grow up in this country a system of large private game preserves, kept for the enjoyment of the very rich. One of the chief attractions of the life of the wilderness is its rugged and stalwart democracy; there every man stands for what he actually is, and can show himself to be." Theodore Roosevelt, The Wilderness Hunter 449 (New York: G.P. Putnam's Sons, 1893).

Nineteenth century American law adopted "the entirely novel view that an explicit consideration of the relative efficiencies of conflicting property uses should be the paramount test of what constitutes legally justifiable injury." Morton J. Horwitz, The Transformation of American Law 1780-1860 at 38 (1977).

90. The Massachusetts Body of Liberties applied to many New England states. As Barrows v. McDermott, 73 Me. 441 (1882) observed, any person has the right to go to a great pond on foot through uninclosed woodlands belonging to another, and to take fish there, but the privilege must be exercised as it is conferred by colonial ordinance of 1641, providing that in doing so he may not trespass on any man's corn, meadow, tillage, or grass land.

91. Couched as custom in order to avoid a conflict with the English parliament. West Roxbury v. Stoddard, 89 Mass. (7 Allen) 158, 166 (1863).

92. West Roxbury v. Stoddard, 89 Mass (7 Allen) 158, 166 (1863).

93. Ibid. 166.

94. The minority at the Constitutional Convention of Pennsylvania argued that the United States Constitution should include a guarantee of the right to hunt on unenclosed lands. Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents, Dec. 12, 1787 (Evans Microprint No. 20618).

95. Pa. Const. section 43 (1776); Vt. Const. section 39 (1977).

96. See State v. Norton, 45 Vt 258 (1872).

97. Fripp v. Hasell, 1 Strob. 173, 176 (S.C. 1847).

98. Both shared almost identical means and ends in altering the English common law to encourage the use of American resources.

99. Wagner v. Bissell, 3 Iowa (Cole) 396, 405 (1857) quoting Seely v. Peters, 10 Ill (5 Gilman) 130 (1848). As the United States Supreme Court observed, the common law rule which characterized entry by cattle to unenclosed lands as a trespass "was ill-adapted to the nature and condition of the country at [the frontier]. Owing to the scarcity of means for enclosing lands, and the great value of the use of the public domain for pasturage, it was never adopted or recognized as the law of the country, except as it might refer to animals known to be dangerous . . . ." Buford v. Houtz, 133 U.S. 320, 328 (1890).

100. A common law version of the fence law was well established in the American colonies. Richard Morris, Studies in the History of American Law with special reference to the seventeenth and eighteenth centuries 208-235 (2d ed. 1959). "Nearly all the states in early days had what was called the fence law . . . " Buford v. Houtz, 133 U.S. 320, 328 (1890).

101. In sustaining the right to cross unfenced private grazing land, the eighth circuit observed in 1914, "The question here, which we think should be answered in the affirmative, is whether Mackay [the entrant] was entitled to a reasonable way of passage over the unenclosed tract of land without being guilty of trespass." Mackay v. Uinta Development Co., 219 F. 116, 120 (8th Cir. 1914).

102. Statutes of the Territory of Wisconsin, An Act to permit certain animals to run at large, page 117. (1838-39). Although the Wisconsin Territorial Statute was not passed until a year after the treaty was consummated, the Wisconsin fence law would have simply recognized a policy previously in place in the Territory. "The law of the accustomed range, cattle theft, penalties, maverick laws, fence statutes, and herd laws all emerged from the frontier experience. From Texas to Montana 'much of the law' was 'after the fact.' G. Bakken, The Development of Law on the Rocky Mountain Frontier: Civil Law and Society, 1850-1912 at 12. Furthermore since the fence laws respond to the problems of a growing population, entry before their enactment was probably approved even more liberally.

103. The Wisconsin Territorial Statute from 1838 is representative. By the statute a person who does not want to pay the cost of a partition fence can do so only if he chooses to "throw up his said lands or meadow for common feeding or to let the same lay open." The relevant provisions (pages 114-116) are as follows: "An Act concerning fences and fence viewers. section 6. Where the lands or meadow of any two or more persons shall join each other, each of them shall make and maintain a just proportion of the division or partition fence between them, except such persons as shall choose to let their lands or meadows lay vacant and open . . . And if any person shall neglect or refuse to make and maintain his part and proportion of such fence, or shall permit the same to be out of repair, every such person shall be liable to, and shall pay, all and every such damages as shall

accrue to his neighbor thereby, to be appraised and estimated by the fence viewers . . . and in case any person who shall have made his proportion of any such fence, shall conclude or be disposed to throw up his lands or meadow for common feeding, or to let the same lay open, he shall give three months notice thereof to the person in possession of the lands or meadow adjoining . . . "
"section 8. When one of the owners of lands adjoining shall have begun to improve before the other, and shall have built a fence on the divisional line between them, and afterwards the other shall improve and shall be advantaged thereby, the occupant, lessor, or proprietor of such land last begun shall pay for one half of the partition fence . . . "

Minnesota also had a fence law. See Boenig v. Hornberg, 24 Minn 307 (1877). As the case statement observes, the defendant attempted to resist paying for the partition fence by asserting his lands were open as commons: "the said premises had ever since been unenclosed and unoccupied, and allowed to lie out as commons by the defendant." ibid. at 308.

104. See, for example, Perkins v. Perkins, 44 Barb 134 (N.Y. 1865), Boenig v. Hornberg, 24 Minn. 307 (1877), James v. Tibbets, 60 Me 557 (1872), Chamberlain v. Reed, 14 Hun 403 (N.Y. 1878), Field v. Proprietors of Land in Nantucket, 55 Mass (1 Cush.) 11 (1848), Ayleswroth v. Herrington, 17 Mich 417 (1868), Miller v. Sanborn, 54 Vt 522 (1881).

105. See, e.g., James v. Tibbets, 60 Me 557 (1872), Field v. Proprietors of Land in Nantucket, 55 Mass (1 Cush.) 11

(1848), Ayleswroth v. Herrington, 17 Mich 417 (1861), Miller v. Sanborn, 54 Vt 522 (1881).

106. Statutes of the Territory of Wisconsin, 114-15 (1838-39). The statute also established, "and in case any person who shall have made his proportion of any such fence, shall conclude or be disposed to throw up his said lands or meadow for common feeding, or to let the same lay open, he shall give three months notice thereof . . . " ibid.

107. This analysis reflects the general pattern of fence statutes. Within Maine, for example, while lands "lie common and unimproved" there is no duty to fence. James v. Tibbets, 60 Me 557 (1872). Within Massachusetts by a statute of 1845 "if any person shall lay his lands common, and determine not to improve any part of the same adjoining fence . . . he shall not be required to keep up or support said fence during the time that his lands shall so lie common and unimproved." Field v. Proprietors of Land in Nantucket, 55 Mass (1 Cush.) 11 (1848). Within Minnesota a landowner who wished to avoid the duty to fence could choose to leave his premises "unenclosed and unoccupied, and allowed to lie out as commons . . . " Boenig v. Hornberg, 24 Minn 307 (1877).

108. George Washington affixed notices to his land to forestall taking of his imported English deer. The Writings of George Washington, volume 37 at page 19 (John C. Fitzpatrick, editor 1940).

109. Marsh v. Colby, 39 Mich 626, 33 Am Rep 439 (1878), cited with approval, McKee v. Gratz, 260 U.S. 127 (1922) (Mr. Justice Holmes). For another example of posting, see Barrows v. McDermott, 73 Me 441 (1882).

110. An Ohio court ruled a hunter might not shoot ducks on the land of another when, as per an Ohio statute, the owner had set up in a conspicuous place on the shore "a board inscribed in legible English characters thus, 'No shooting or hunting allowed on these premises.' " State v. Shannon, 36 Ohio St. 423, 38 Am Rep 599 (1881). See also Reynolds v. Commonwealth, 93 Pa. St. 459 (1880): A Pennsylvania statute passed in 1876 read "any person trespassing [to take fish] after public notice on the part of the owner or occupant thereof, such notice being posted adjacent to such pond, stream or spring, shall be deemed guilty of trespass, and in addition to damages recoverable by law, shall be liable . . . in a penalty of $100."

111. See Smith v. Kinard, reprinted in Jeter v. Mann, 2 Hill 641 (S.C. 1835) (the existence of a South Carolina privilege to enter to take game does not mean a South Carolina privilege exists to cross land for regular access to other land) and Broughton v. Singleton, 2 Nott & McC. 338 (S.C. 1820) ("The attempt to give this protection [of allowing a trespass quare clausum fregit action] to uninclosed land, would overwhelm us in a sea of petty litigation, destructive of the interests and peace of the community" ibid. at 340.

112. Statutes of the Territory of Wisconsin, 1838-39, page 114. See Barrows v. McDermott, 73 Me. 441 (1882) (referring not to fences, but rather to "tillage or mowing land.") ibid. at 451.

113. The Wisconsin Territorial statutes imposed penalties on those who "maliciously throw down or open any bars, gate or fence and leave the same down or open." Statutes of the Territory of Wisconsin, An Act to provide

for the punishment of offenses against private property, page 350 (1837-38). The implication of the provision is that good faith passage through enclosed agricultural land was proper.

114. F.W. Maitland, The Forms of Action at Common Law 4-5 (1936 ed.

115. Edwards v. Kearzey, 96 U.S. 595, 600, quoting 1 Bac. Abr., Tit. Actions in General, letter B.

116. III Blackstone 210.

117. Joseph Chitty, Treatise on the Parties to Actions, the Forms of Actions, and on Pleading, volume I at 175 (Sixth American Edition 1833).

118. Bracken v. Preston, 1 Pinney's Wis Reports 584, 597 (1845) (quoting Bacon's Abr., title Trespass, page 566).

119. "Wildlife at large is not truly owned by any person, private or governmental – although it took the Supreme Court more than a century to reach that rather obvious conclusion. Hughes v. Oklahoma, 441 U.S. 322 (1979)." G. Coggins, Public Natural Resources Law, section 18.

120. Even the great Blackstone himself observed, "all mankind had by the original grant of the Creator a right to pursue and take any fowl or insect of the air, any fish or inhabitant of the waters, and any beast or reptile of the field." 2 W. Blackstone Commentaries *403.

121. According to an important New Jersey decision, wildlife belonged to all people in common "by the very law of nature itself." Arnold v. Mundy, 6 N.J.L. 1, 70 (Sup.Ct. 1821).

122. State v. Campbell, 1 T.U.P.Charlt. 166, 168 (Ga. Super Ct. 1808).

123. "Wild beasts, birds, fish, and all the animals which are bred either in the sea, the air, or upon the earth, do, as soon as they are taken, become instantly, by the law of nations, the property of the captor: for it is agreeable to natural reason, that those things which have no owner, should become the property of the first occupant: and it is not material whether they are taken by a man upon his own ground, or upon the ground of another." Justinian's Inst. lib ii, tit. 1, sect. 12.

Report And Direct Testimony Of Professor James M. McClurken For Plaintiffs (January 31, 1994) (Excerpts)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

MILLE LACS BAND OF CHIPPEWA INDIANS, ARTHUR GAHBOW, WALTER SUTTON, CARLEEN BENJAMIN, and JOSEPH DUNKLEY,	)	
Plaintiffs,	)	
UNITED STATES OF AMERICA,	)	
Plaintiff-Intervenor,	)	Civil
vs.	)	No.
STATE OF MINNESOTA, MINNESOTA DEPARTMENT OF NATURAL RESOURCES, and ROD SANDO, COMMISSIONER OF NATURAL RESOURCES,	)	4-90-605
Defendants,	)	
COUNTY OF AITKEN, *et al.*,	)	
Defendant-Intervenors,	)	
JOHN W. THOMPSON, *et al.*,	)	
Defendant-Intervenors,	)	
and SAVE LAKE MILLE LACS ASSOCIATION,	)	
Amicus Curiae.	)	

REPORT AND DIRECT TESTIMONY OF PROFESSOR JAMES N. McCLURKEN FOR PLAINTIFFS

THE 1837 TREATY OF ST. PETERS
PRESERVING THE RIGHTS OF THE MILLE LACS
OJIBWA TO HUNT, FISH, AND GATHER:
THE EFFECT OF TREATIES AND AGREEMENTS
SINCE 1855

by

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1-31-94 (revised)

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Exercising Rights to Hunt, Fish, and Gather On and Off Reservation

In the years immediately following the 1855 Treaty of Washington, the Mille Lacs continued to exercise treaty-based hunting, fishing, and gathering rights as they had prior to the agreement. Indeed, in the years immediately after the treaty's ratification, the Mille Lacs Ojibwas may have intensified harvesting activity to meet the needs of lumbermen who were cutting pine on the lower reaches of the Rum River at the time. One young lumberman who worked in Browning Camp during the dam incident discussed previously, described the Mille Lacs Ojibwas' trade with the men in his camp:

> They plant now some but live principally on fish of which there is a great abundance in R. river. You have to deal square with them for if they

> find you are afraid of them they will handle you rather rough and take whatever they want . . . [27]

This same young lumberman purchased his dinner on June 16.

> had soop [sic] for my dinner. I got the rice from the Indians. It groes [sic] here spontaniously [sic] in the numerous small lakes. The stalk groes [sic] about four feet long. At the top of the water comes the head. There is hundreds of bushels might be gathered but the natives are indolent and gather but little. When it is ripe the squaws will take their canoes and padle roinud [sic] among it. They cut the head off with knives. It is some like oats. They then will dry it and put it on a blanket and tred [sic] it out with their feet. They then put it in a barrel and pound the hull off from it with sharp sticks. The squaws doe [sic] all the work and the bucks hunt a little. They shoot deer but they are rather scarce.[28]

The following day the lumberman bought moccasins from a Mille Lacs Ojibwa woman. The woman took a green hide, used water and fire to tan the hide in a short time, and made the moccasins in about four hours. The lumberman noted that the Ojibwas had been on "the small brooks" hunting deer. On June 24 the lumberman and a companion visited a Mille Lacs Ojibwas village. That morning they breakfasted on rice and maple sugar.[29]

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[27] MNHS A-L958. June 12, 1855. Lumberman's Diary.

[28] MNHS A-L958. June 12, 1855. Lumberman's Diary.

[29] MNHS A-L958. June 12, 1855. Lumberman's Diary.

The 1855 treaty provided that the Indians were to receive agricultural implements to encourage them to practice agriculture. In some parts of the ceded territory, gardening had already increased by 1855. The greater amount of vegetables the Ojibwas raised had not, however, diminished their dependence upon wild rice. When agent George Whiting arrived to make the 1855 annuity payments he noted that the Indians had increased their gardening in the last year. Still, when he arrived in mid-August, the Indians were "much scattered" gathering rice. The payment was delayed until September 20, 1855.[30]

The time of year when the United States delivered annuity payments regularly conflicted with Mille Lacs Ojibwas hunting, fishing, and gathering. When the Indians could themselves determine the time of payments, there is evidence that they preferred summer payments. For example, the $1,000 payment that the Mille Lacs Ojibwas were to receive in compensation for the destruction of the rice crops because of the lumbermen's dam across Rum River was scheduled for delivery in June.[31] Summer travel was easy, and the Band was traditionally gathered together at Mille Lacs Lake, not dispersed over the countryside on winter hunts.

Chiefs Shaboshkung, Bedud, Ayahbe, Menonimikashe, Sheeniah, and Kagwatosh raised the issue of late annuities in 1861 in a letter to President Abraham

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[30] NAM M234 R.151:147. February 20, 1856. G. Whiting to G. Manypenny.

[31] NAM M234 R.151:29. August 12, 1856. F. Huebschmann to D. Morrison.

Lincoln. The letter reminded the President that the 1855 Treaty of Washington included $5,000 which was intended to build a road to the Mille Lacs Reservation. The treaty negotiators had approved this expenditure so that annuities could be made upon the Mille Lacs Reservation. The chiefs complained that the road had been cut in 1855 and open for a long time.[32] They reported that 635 Ojibwas lived on the Reservation, and that the goods for all of these people had to be carried on their backs, across the frost and snow. Because the annuities were not delivered on the Reservation:

> Our best hunting time is lost and great expense and suffering is produced by present arrangements.[33]

The chiefs requested that the President direct his officers to "make our payments at our own Reserve."[34]

If the Mille Lacs Ojibwas had immediately attempted to rely upon agriculture for a living, they would have starved. In 1856, many of the Band planted gardens for the first time. Grasshoppers ate the Indians' corn and potatoes. Because of flooding caused by the lumbermen's dam, the rice crop was only one third of its normal

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[32] NAM M234 R.151. November 10, 1855. McAboy to G. W. Manypenny; NAM M234 R.151:94. June 2, 1856. W. McAboy to G. Manypenny; NAM M234 R.151:103. August 30, 1856. W. McAboy to G. Manypenny.

[33] NAM M234 R.152:269. n.d. 1861. Shaboskung et al. to President.

[34] NAM M234 R.152:269. n.d. 1861. Shaboskung et al. to President.

amount. Famine threatened.[35] The 1861 letter from the Mille Lacs Chiefs to the President of the United States cited above also indicates that a full five years after the treaty had been concluded, the Mille Lacs Ojibwas had not benefitted from the Article 4 provision designed to further agricultural development. By this provision, the Mille Lacs Ojibwas understood that they were to receive $2,000 per year to hire farmers and carpenters to aid them in the transition to an agricultural economy.[36] They complained:

> We added to our annuities at the Treaty of 1855 $2,000 per year from monies formerly used for farming, schools etc but we do not see that we have received anything of it.[37]

The first annual report of the newly appointed Indian Agent Lucius Walker to Minnesota Superintendent of Indian Affairs C. W. Thompson in 1861 confirms that none of the provisions of the 1855 treaty designed to encourage agriculture at Mille Lacs were complied with. Walker said:

> Of the Mississippi bands I am compelled to state that they have no farms under cultivation and although there was a small amount of money turned over to me by my predecessor, for the purpose of clearing and breaking on the Reservations of these Indians, it is entirely inadequate to carry out the stipulations of the treaty on that

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[35] NAM M234 R.151:103. August 30, 1856. W. McAboy to G. Manypenny.

[36] Kappler 1972(2):689-690.

[37] NAM M234 R.152:269. n.d. 1861. Shaboskung et al. to President.

> subject or to benefit them to any general extent or in any permanent manner . . . There is a large arrearage fund due these bands which they are all very anxious should be expended for their use. They often speak of this fund and the great necessity of its expenditure in building them houses, ploughing their land, furnishing them seed, establishing a school and other advantages of which they feel the great need.[38]

Walker believed that the greatest difficulty with providing the educational and economic development services provided in the treaty was the great distances between Reservations. The agent could not supervise the work of civilizing the Indians. He proposed moving all of the Indians to a single Reservation where their advancement could be better supervised. This proposal might reflect the commitment that agent Walker had to relieving the Ojibwas of their remaining lands, rather than any desire to transform the Indian economy.[39]

Given that some of the finest trapping, hunting of aquatic birds, fishing, and gathering in the area was located on and around the Mille Lacs Reservation, there can be no doubt that the Indians used the resources both on and off the Reservation. Contemporary accounts leading to the events of 1862 show that the Mille Lacs Ojibwas continued to hunt, fish, and gather off-Reservation. Deer in particular were scarce on the Reservation and were

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[38] NAM M1166 R.7:42. September 25, 1861. L. Walker to C. Thompson.

[39] NAM M1166 R.7:42. September 25, 1861. L. Walker to C. Thompson.

pursued throughout the ceded territory.[40] That year Agent Walker's report included the following description of the Band's subsistence patterns.

> Of the Mississippi bands, aside from those living upon this Reservation (Gull Lake), I have visited the bands upon Mille Lac and Rabbit Twice Reservations. Their habits are roving, unsettled and marauding, always changing from place to place, with no villages nor permanent houses. They live in tents or wigwams built chiefly of birch bark or woven flag leaves; these they pitch or take up with little ceremony, the squaws doing all the work, packing the tents, household stuff, and all their little world of goods upon their backs travel all day and pitch their tents again at night. They sometimes travel in families of two or three, but usually alone. They remain sometimes days perhaps weeks upon the shore of a lake, always catching fish in abundance which forms their principal staple of food, they also collect large quantities of rice from some of the lakes, which is another important article of food among them; but they soon became tired and weary of existing too long in one place, and so move from lake to lake or settle, for a while, upon the bank of some favorite river. And these traits of character, habits and mode of life will apply to all the Indians under my charge. . . . Some families connected with bands living upon distant Reservations scarcely see their houses during the year, but roam about from place to place lurking about the homes of white settlers . . . [41]

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[40] MNHS A-L958. June 12, 1855. Lumberman's Diary.

[41] NAM M234 R.153:108. March 22, 1862. Lucius Walker to C. W. Thompson.

Agent Walker wanted the Mississippi Ojibwas – including the Mille Lacs people – to settle on one reservation. There they could be educated in academic pursuits and in the industries of civilized life, a goal that the United States did not accomplish in the nineteenth century. As late as 1882 Agent George Chapman spoke of the Mille Lacs Ojibwas saying that:

> Nearly all of these Indians have no fixed habitation. 400 of the band are now and have been for a number of years on the Snake River, the balance excepting 30 families, are scattered about the country within a radius of 30 or 40 miles. These Indians do not cultivate the soil but live on wild rice fish and game. They have no teams, oxen, wagons or any farming utensils. And under present management with no one to look after them, nothing can be expected of them but drunkenness, wretchedness and poverty.[42]

The thirty or forty mile radius within in which the Mille Lacs Ojibwas operated is well beyond the boundaries of their small Reservation. In 1883, Agent John Wright made a second investigation of the Mille Lacs Reservation and surrounding settlements. He found that:

> They live mostly in birch-bark tepees though there are a few old log houses in tolerably fair condition. They have no oxen and but few ponies or plows, consequently their garden patches are small and poorly cultivated . . . As a rule the men were lying idly around the lodges while even the labor of taking fish from the nets and bringing wood and water was imposed

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[42] Special Case 109. August 25, 1882. Mille Lac Reservation Inspection by Geo. M. Chapman.

> upon the women. These Indians at proper season of the year gather wild-rice, cranberries, blue berries &c. and hunt deer, rabbits and other animals when they can be found . . . Of the five hundred (500) Indians accredited to Mille Lac I found not exceeding two hundred and seventy (270) on the reservation, the balance are on Snake River and in the adjacent country.[43]

There is literally no time during the nineteenth century when the Mille Lacs Ojibwas did not continue to exercise the right to hunt, fish, and gather, both on the Reservation and off. As late as 1902, the Mille Lacs Ojibwas continued to reside on and off the reservation.[44]

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the late 1880s with the passage of the Nelson Allotment Act.

Indian Office correspondence for the year 1871 ends as it began, with Minnesotans clamoring for a piece of the Mille Lacs Reservation. A letter that J. P. Owens wrote from the Taylors Falls Land office explained that the Lake Superior and Mississippi Railroad had opened up agricultural lands along the line. Owens explained further that Mille Lacs and Kanabec Counties were the only places where there was agricultural land available for homestead, and that there was little left. Owens stated that:

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[43] Special Case 109. June 27, 1883. John A. Wright to H. Price.

[44] CCF WHITE EARTH 46578-1909, 175.2. No Date, 1902. W. A. Jones to Secretary of Interior.

settlement in that county is greatly retarded by the frequent presence of marauding Chippewa Indians of the Mille Lac Band who are continually prowling about and frightening the women and children of the few Scandinavian settlers already on the borders of the settlement. These people have heard of Indian depredations in Minnesota, and although these Chippewas may be harmless so far as taking life is concerned, yet they are as effective in preventing settlement and improvement of the country, as though they were a band of actual murderers, such as were the Sioux on our frontier in 1862. . . . Could these Indians be removed in accordance with the stipulations of the treaty of March 11, 1863, I have no doubt that another year would see a considerable influx of settlers into Kanabec and Mille Lacs Counties. It seems that Indians have been kept here under the good behavior clause of the treaty just named. They have, nevertheless, been of the greatest annoyance to settlers in Isanti, Anoka Pine, Mille Lac and Kanabec Counties for years, stealing what they could lay their hands on and carry off, provided they thought they would not be caught in the act, and committing other depredations.[180]

The Mille Lacs Ojibwas received little respite in 1872. Governor Austin issued a proclamation which purported to require the Ojibwas to remain on the reservations, limiting access to the natural resources that they required to make their living. If they ventured outside the Reservation boundaries, they were subject to arrest by the

[180] NAM M234 R. 159:14. December 13, 1871. J. Owens to J. Averill.

Minnesota Militia.[181] The United States determined that its best course of action was to encourage the Mille Lacs Ojibwas to move to the White Earth Reservation. The House and Senate issued a joint resolution appropriating money for the move.[182] By November, only twenty-five Mille Lacs Ojibwas moved.[183] Grasshoppers had destroyed the Ojibwas crops at White Earth Reservation, and the people who remained there faced starvation by January of 1873.[184] It is impossible to tell how many of these emigrants left Mille Lacs permanently. Also in November, Agent Smith forwarded to his superiors a proposal from A. H. Wilder to acquire the Mille Lacs Band's interest in the pine timber of the Reservation. Smith recommended the sale as a way for the Mille Lacs Ojibwas to fund agricultural development on the Reservation. He argued that the 1863 treaty ceded the reserved townships, with the Indians:

> reserving to themselves the right of continued occupancy during good behavior. The right of occupancy being the only original right of the Indians in this land, it is evident that the government procured by this treaty nothing more than the right to compel the removal of the Indians in case of bad conduct.[185]

[181] NAM M234 R.159:147. May 13, 1872. H. Austin to S. P. Jemison; ARCOIA 1872:22-25.

[182] House Document 83 (42-2) 1510, January 23, 1872. Removal of Chippewa Indians.

[183] ARCOIA 1872:22-25.

[184] NAM M234 R.160:343. January 21, 1873. M. Kellogg to Commissioner of Indian Affairs.

[185] Special Case 109. November 8, 1872. E. P. Smith to Anon.

Smith proposed that if the Indians received the proceeds from the sale of pine, they could use the money to attempt "living in a civilized way by cultivation of the soil" on the

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Report And Direct Testimony Of Professor John D. Nichols For Plaintiffs (January 3, 1994)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

MILLE LACS BAND OF CHIPPEWA INDIANS, ARTHUR GAHBOW, WALTER SUTTON, CARLEEN BENJAMIN, and JOSEPH DUNKLEY,	)	
Plaintiffs,	)	
UNITED STATES OF AMERICA,	)	
Plaintiff-Intervenor,	)	Civil No. 4-90-605
vs.	)	
STATE OF MINNESOTA, MINNESOTA DEPARTMENT OF NATURAL RESOURCES, and ROD SANDO, COMMISSIONER OF NATURAL RESOURCES,	)	
Defendants,	)	
COUNTY OF AITKEN, *et al.*,	)	
Defendant-Intervenors,	)	
JOHN W. THOMPSON, *et al.*,	)	
Defendant-Intervenors,	)	
and SAVE LAKE MILLE LACS ASSOCIATION,	)	
Amicus Curiae.	)	

REPORT AND DIRECT TESTIMONY OF PROFESSOR JOHN D. NICHOLS FOR PLAINTIFFS

The Translation of Key Phrases in the Treaties of 1837 and 1855

John D. Nichols

Qualifications and Work Undertaken

I hold an A.M. (1972) and a Ph.D. (1980) in Linguistics from Harvard University. My special area of study was in the indigenous languages of North America with specialization in those of the Algorquian language family, which includes Ojibwe (Chippewa).[1] The subject of my doctoral dissertation was the word structure (morphology) of that language. It was based on extensive interviews with speakers in Minnesota, the analysis of recorded narratives and conversations, and study of the linguistic literature on Ojibwe and other Algonquian languages. Since 1968 I have collected and analyzed extensive data on the language from many speakers in Minnesota, Wisconsin, Ontario, and Manitoba. I also have studied older written documents of the language as spoken in these areas.

The following are my publications of the last ten years:

"Freda Ahenakew", "Maude Kegg", and "Gladys Tantaquidgeon" entries in the *Garland Directory of Native America Women: Native American Women*, Garland Press, 1993.

[1] The term Ojibwe will be used throughout to refer both to the people and the language often known as Chippewa, Ojibwa, or Ojibway.

"New Forward" to reprint of Frederic Baraga's 1878-80 *A Dictionary of the Otchipwe Language*. Pp. v-xv. St. Paul: Minnesota Historical Society Press, 1992.

Editor of M. Kegg's *Portage Lake*. Edmonton: University of Alberta Press, 1991. Minneapolis: University of Minnesota Press, 1993.

Editor of Leonard Bloomfield's manuscript text of *The Dog's Children and Other Anishinaabe Texts of Angeline Williams*. Winnipeg: University of Manitoba Press, 1991.

" 'Chant to the Fire-fly': A Philological Problem in Ojibwe." In *Linguistic Studies Presented to John L. Finlay*, H.C. Wolfart, ed. Pp. 113-126. Algonquian and Iroquoian Linguistics, Memoir 8.

"The Wishing Bone Cycle: A Cree 'Ossian'?" *International Journal of American Linguistics*, 55:155-178, 1989.

Editor, *An Ojibwe Text Anthology*. Studies in the Interpretation and Teaching of Canadian Native Languages and Cultures 2. London: Centre for Research and Teaching of Canadian Native Languages, University of Western Ontario, 1988.

Editor, *'Statement Made by the Indians': A Bilingual Petition of the Chippewas of Lake Superior, 1864*. Studies in the Interpretation of Canadian Native Languages and Cultures 1. London: Centre for Research and Teaching of Canadian Native Languages, University of Western Ontario, 1988.

"The Composition Sequence of the First Cree Hymnal". In *Essays in Algonquian Bibliography*, H.C. Wolfart, ed., pp. 1-21. Algonquian and Iroquoian Linguistics Memoir 1, 1984.

Editor of M. Kegg's *Nookomis Gaa-inaajimotawid/What My Grandmother Told Me*. Occasional Publications in Minnesota Anthropology, Minnesota Archaeological Society, 1983. Revised edition, Bemidji: Indian Studies Publications, 1990. (Historical texts with full glossary.)

To appear in 1994 is the following:

(with E. Nyholm). *A Concise Dictionary of Minnesota Ojibwe*. Minneapolis: University of Minnesota Press, to appear.

In connection with this litigation, I was asked to examine the English language texts of the Treaties of 1837 and 1855, especially certain passages dealing with hunting, fishing, and gathering and with the relinquishment of right, title, and interest to certain lands, to determine how key phrases might have been translated into Ojibwe by interpreters at the negotiations and how they would have been understood by the Ojibwes present at those proceedings. The research undertaken involved examination of those texts and the journals of the negotiations, study of early to mid-nineteenth century dictionaries and grammars of Ojibwe, review of my own field notes and dictionary files based on interviews with several hundred speakers of the language, and study of written translations between English and Ojibwe done in the early and mid-nineteenth century, In order to understand possible translations and to ascertain the form and meanings of particular words, I interviewed seven speakers of Ojibwe from Minnesota, Wisconsin, Ontario, and Manitoba.

Payment for the work to date is to be at the rate of $100 an hour (up to a limit of 70 hours) into a fund to be held by the Mille Lacs band in support of research on the Ojibwe language.

Differences between the English and Ojibwe Languages Affecting Translation

English and Ojibwe are about as different as any two languages can be in the way that words and sentences are constructed. They package information in very different ways. English tends to have one or two ideas per word; Ojibwe tends to wrap up many ideas into a word, with each idea represented by a word part (a root, a prefix or a suffix) or a modification of sounds. For example, the idea of "break" is expressed in English by a single word *break* which can't be analyzed into any smaller pieces. A small number of suffixes can be added to inflect it to represent such English grammatical ideas as third person singular subject (he/she/it) in *breaks* and on-going action in *breaking*, with the idea of past tense shown by a modification of the vowel in *broke*. To talk about different kinds of breaking or what is broken, different words, organized into particular patterns of phrases or clauses, must be added.

In contrast, Ojibwe analyzes "breaking" into separate sets of ideas, each of which is represented by one or more word parts rather than by a whole word. Several word parts must be combined in accord with certain rules or patterns to make a pronounceable word. The appearance of the object which is broken is specified by a root; three of the possible roots for this idea are: *bookw-* "in two equal pieces", *biigw-* "in several pieces", and *biis-* "in small fragments." The means or instrument by which this configuration was achieved is then specified with a suffix; a few of the suffixes that can be used are: *-a'* "by some tool", *-n* "by the hand", *-bid* "by the hands pulling", *-shk*

"by the body or foot", *-sid* "by dropping or hitting against", and *-aganaand* "by hitting." A third part identifying a specific kind of object (such as a body part) or the nature of the material broken (such as *-aakw* "something stick-like", *-iig* "something flat and flexible", or *-aabiig* "something string-like") may come between the two main parts. The resulting word stem specifies how something was broken and what the result looks like; it may identify exactly what was broken or the nature of the material of what was broken. There is no general word corresponding to the English word "break."

A few of the hundreds of verb stems that can translate the English word "break" and which use the elements given above are: *-bookwa'-* "break something in two with a tool", *bookon-* "break something in two in the hand", *bookobid-* "break something in two by pulling", *bookoshk-* "break something in two by sitting, bumping or kicking, *biisibid-* "break something into small fragments by pulling", *biisisid-* "break something into small fragments by dropping", and *bookwaakobid-* "break something stick-like in two by pulling."

These verb stems are still not words that can be pronounced in sentences. The stems must be surrounded with inflectional prefixes and suffixes identifying the basic grammatical ideas of Ojibwe to become actual words which fit into meaningful sentences. There are many of these grammatical ideas, the majority of which have no direct equivalents in English. They specify such things as the gender, number, person, and relative importance of the subject and any objects; tense; aspect; state of negation; and, clause type (main, subordinate, or imperative). Each of the verb stems for "break" given above, like

any Ojibwe verb, may appear in 3000 to 5000 distinct inflected forms, depending on which affixes are required in a particular use.

Accurate translation between languages with such radically different grammars can be extremely difficult; information must constantly be left out or added to make sense in the other language. The very conceptual systems underlying each language are different. The words of the one language do not directly parallel words of the other language as each language differs in the way reality is segmented into words or word parts. The rules or patterns of combination of words into clauses and sentences also differ extensively. These difficulties are compounded by the differences in vocabulary due to cultural and historical factors.

Every language has a vocabulary of words or word-building parts developed to be adequate for the communicative needs of its users over hundreds and hundreds of years. Ojibwe, for example, has highly developed vocabulary for discussing the technology of maple sugar processing, for canoe travel, and for the abstract concepts of Ojibwe religion, among other areas of cultural importance. English has highly developed vocabulary in many areas, the law among them. Carefully cultivated by professionals, the vocabulary in this area is taught in law schools, codified in legal dictionaries, and refined by argument in court and by scholarship. Traditional small-scale Ojibwe society, however, had very different legal institutions. Within this legal system, individual ownership of land was not a concern and consequently the Ojibwe language has far fewer words in this area than does English.

Intertranslatability can be achieved between two languages as they come to share institutions; languages may change their vocabularies as the need to do so arises. This process takes time however and the Ojibwe vocabulary for English legal institutions and processes is still extremely limited and inexact even after over a century of contact with them. An interpreter today, as in the nineteenth century, has little in the way of matching vocabulary to work with, especially when translating documents and negotiations of a legal nature between English and Ojibwe.

The Quality of Translation between Ojibwe and English in the Early Nineteenth Century

There have been no studies of the work of interpreters at treaty negotiations and signings in this period that I know of. For several reasons I believe the quality of interpretation at this time was poor and misunderstandings were frequent.

The poor quality of the interpreters and their work was a matter of comment by the American participants in negotiations with the Ojibwe. Henry R. Schoolcraft, Indian agent, superintendent and scholar of the Ojibwe language, commented in his journal for January 12, 1838 that "the department is very much in the hands of ignorant and immoral interpreters, who frequently misconceive the point to be interpreted (Schoolcraft 1851:583)."

Verplanck Van Antwerp, in his journal of the negotiations for the Treaty with the Chippewa, July 29, 1837, dismisses the interpreters as "unfit to act in that capacity" (Van Antwerp [1837] 1991:142, note 5).

The interpreter at the negotiations for the Treaty of 1855 was unable to handle long stretches of speech: "Paul, the interpreter, suggested that, as his memory was defective, he would be glad if the speeches were broken into smaller fragments (1855 Treaty Journal, entry for February 15)." He had difficulty in translating numbers: "[The interpreter] said it was difficult to make them understand, owing to the large quantity of acres in the tract (ibid., entry for February 17)." The translations offered did not always make sense to the Americans: "Flatmouth made a remark, which the reporter did not understand (ibid., entry for February 15)."

The Americans present could refer to their written notes and documents during and between negotiations. The Ojibwes, without the aid of permanent written records they could read, either of their own speeches and discussions in Ojibwe, or of the government speeches, discussions, and documents, had to rely on their memories and interpreted prompts from Americans using the written documents in English. Commissioner Manypenny himself didn't expect the Ojibwe to understand treaty negotiations or documents:

> The Commissioner said one great impediment to a good understanding between the government and the Indians arose from the fact that the latter cannot read or understand the contracts which they make (ibid., entry for February 12).

While some of the interpreters were probably fluently bilingual in both Ojibwe and English, my study of notes on the Ojibwe language prepared by Edwin James, a military surgeon present at the Treaty of 1825, and stationed at Prairie du Chien and Ft. Snelling, reveals that

a pidgin Ojibwe was widely used in the Mississippi and Wisconsin River valleys as a contact language between Euro-Americans and Indians, and between tribes speaking different languages. A pidgin is a reduced and simplified form of one of the languages involved in contact between speakers of different languages. It is no one's native language, but is only used in a contact situation, learned as a second language by both parties. Typically the grammar of the donor language is radically simplified and the vocabulary, greatly restricted in number of words and limited in the complexity meanings it can express, is taken from more than one language. The pidgin Ojibwe recorded by James in 1825-26 and documented by him as being of wide use, meets these criteria. It is likely that this limited form of language may have been used by at least some interpreters in treaty negotiations. While suitable for purposes of basic communication and trade, a pidgin language is not suitable for the translation of such complex language as that used in treaties.

Treaty with the Chippewa, 1837

Article 5. The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers, and the lakes included in the territory ceded, is guarantied to the Indians, during the pleasure of the President of the United States.

1. "privilege of"

The first problem faced by an interpreter is that the English sentence objectifies the activities by using nouns for not only "privilege" but also for the activities named as "hunting", "fishing", and "gathering." If the Ojibwe

equivalent of this phrase is to be understood it must be recast with verbs (action and process words) rather than nouns (thing words). It is characteristic of the structure of the Ojibwe language that most actions, processes, and states of being are identified with verbs; nouns play a secondary role and are used primarily to name concrete beings and things. While abstract nouns can be made from verbs, the resulting nouns are limited in the kind of grammatical relationships they can enter into. Of the ways in which relationships between nouns, such as that in the expressed by "of" in the English phrase "privilege of hunting, fishing, and gathering", can be indicated in Ojibwe, none is possible here. The second problem is one of vocabulary; there is no direct equivalent of "privilege" in Ojibwe.

The most likely strategy used by an interpreter for this phrase would be to inflect the verbs for the activities with a modal prefix *daa-* "possibility, potentiality", often translated back into English as "can" or by such other modal auxiliary verbs as "could, may, might." The result would be something like "they can hunt, they can fish, and they can gather wild rice" with *anishinaabeg* "Indians, Ojibwes" as the subject of the verbs.

2. "guarantied"

If this word was translated at all, the most probable equivalent I have found is *baataayaakonigaade*, with a root *baataa-* "stuck, firmly fixed in place" and a series of suffixes meaning "it is set by law, by council." This is a very strong term indicating something absolutely fixed in law by authorities.

3. "hunting, fishing, and gathering the wild rice"

There are two main verbs "hunt" in Ojibwe: *giiyose* and *nandawenjige*.[2] These are written *giosse* and *nandawendjige* and cited as equivalents for the English word "hunt" by Bishop Frederic Baraga in his dictionary of Ojibwe, the only such dictionary prepared during the period of the treaties (Baraga 1853:524); both continue in use in the Ojibwe language today. The first verb *giiyose* refers to walking about going after game animals, that is, "stalking", and the second *nandawenjige*, literally "wanting things", to hunting in general. Baraga distinguishes the two verbs in the Ojibwe-English section of his dictionary by translating the first as "go a-hunting" (ibid., 132) and the second as "desire" and "look for s.th. (especially in hunting or fishing)" (ibid., 268).

It is the second and more general term that most probably was used to translate "hunting" in the treaties. Understood as possible objects of this verb are animals of any size or species, including fish. The techniques included under *nandawenjige* include hunting using any

[2] Ojibwe words given in italics are transcriptions of the spoken form written by me using a modern standardized writing system based on that used in the modern dictionaries (Nichols and Nyholm 1979, Rhodes 1985). Underlined Ojibwe words are given in the spelling used in the original source. Although the spelling may differ, there has been no significant change in the pronunciation of any of the words cited in the Western Great Lakes region, including Minnesota, since the early nineteenth century records of Ojibwe. All Ojibwe verbs are inflected; there is no "infinitive". I cite the verbs either in an intransitive form with a third person singular ("he" or "she") subject as used in main clauses, or as an abstract stem, indicated with a trailing hyphen, as are word parts.

techniques of finding, attracting, and killing animals, among which are the following: *agoodoo* or *nagwaajige* "snare", *baashkizige* "shoot with a gun", *bimojige* "shoot with bow and arrow or other missile", *giiyose* "hunt by stalking", *miikanjige* "set bait", *wanii'ige* "trap", and *waaswaa* "torch; attract game or fish by shining a light." For specific techniques of fishing, see the discussion below. Some consultants indicate that *nandawenjige* may extend to the gathering of plants, but I found no general agreement on this.

There is one main verb for "fish": *giigoonyike*, which is made from the noun *giigoonh* "a fish" and a verbal suffix *-ike* "make, gather, process." Cited as *gigoike*, this is the only general verb given by Baraga in his dictionary under the English entry "fishing"; all the other related terms there and in adjacent entries are given as equivalents of specific techniques for fishing (ibid., 498-99); this is also the general verb for "fish" in the contemporary Ojibwe language. The verb *giigoonyike* refers to fishing using any technique and for any species of fish. Understood as included under this general term are verbs naming specific techniques of fishing, among them the following: *akwa'waa* "spear fish through the ice", *bagida'waa* "set a net for fish", *bagidaabii* "set a line with hooks, use a set line", *nanda'waa* "spear fish in open water", *waaswaa* "catch game or fish by attracting with a light", and *wewebanaabii* "fish with a hook and line, angle."

There is one general verb for gathering wild rice: *manoominike*, a verb derived from the noun *manoomin*

'wild rice" and the verbal suffix *-ike* "make, gather, process." This refers only to gathering and processing wild rice.

While the first two verbs are quite general in their application, and the third names the most important plant gathering technology of the Ojibwe, the conjunction of all three is somewhat unusual. Especially when coupled with another unusual set of conjoined words "the lands, the rivers, and the lakes" it would make a unnatural Ojibwe expression. The three specific terms seem intended to stand for all of the ways the Ojibwe utilized natural resources. What is being talked about here is summed up in the English expression "living off the land." When Ojibwes talk about the use of natural resources in this way, they do not list specific techniques, but use some variant of the verb stem *onji-bimaadizi-* "live by means of something, get a living from something" as in the phrase *wenji-bimaadiziyaang* 'from what or where we get our living, our life", referring to all the necessities of life: food, clothing, shelter, medicine, utensils, etc. Such a phrase commonly appears in traditional prayers.

That such a phrase was used by the Ojibwe in negotiating the treaty is indicated in the notes on the negotiations for the treaty of 1837 made by Verplanck Van Antwerp ([1837] 1991). In reporting a speech of Ma-ghe-ga-bo, Van Antwerp criticizes the interpreters for their literal translation of the speech at the phrase "we wish to hold on to a tree *where we get our living*" (emphasis supplied) and "to reserve the streams where we drink the waters *that give us life*" (emphasis supplied) (ibid., 142). Speaking of the lands, Ma-ghe-ga-bo noted "we have heretofore *got our living from them*" (emphasis supplied)

(ibid., 143). The phrases emphasized are literal translations of the verb *wenji-bimaadiziyaang* "from what or where we get our living, our life", in constructions that center on a different noun in each case, as reconstructed in the following phrases: *mitig wenji-bimaadiziyaang* "a tree from which . . . "; *nibi wenji-bimaadiziyaang* 'water from which . . . "; *akiin wenji-bimaadiziyaang* 'lands from which. . . . "

Aish-ke-bo-gi-ko-zhe (Flat Mouth) used the phrase repeatedly, as indicated by the translations reported by Van Antwerp (emphasis supplied):

> Your children are willing to let you have their lands, but they wish to reserve the privilege of making sugar from the trees, and *getting their living from* the Lakes and Rivers as they have done heretofore . . . There is some game on the land yet; & for that reason, we wish to remain on them, *to get a living* . . . The Great Spirit above, made the Earth, and causes it to produce, *which enables us to live.* (ibid., 145)

All of the emphasized phrases translate Ojibwe phrases using the verb stem *onji-bimaadizi-*. If the interpreters were translating for meaning, it is probable that they would have used a normal Ojibwe expression, one that had been used repeatedly by the Ojibwes in the negotiations, one employing the verb stem *onji-bimaadizi-* in an appropriate phrase such as *gakina gegoo wenji-bimaadiziwaad* "all the things from which they get their living" to translate the English expression "hunting, fishing, and gathering the wild rice, upon the lands, the rivers, and the lakes." This would have been understood to have included all natural resources used for food,

medicine, worship, and manufactures, to be used by the Ojibwe or traded for other goods.

4. "during the pleasure of the President of the United States"

If this phrase had been translated at all, a literal translation would not have been understood to have placed a limit on the activities. A restrictive phrase would have contradicted the strength of the probable translation of "guaranteed" as *baataayaa-konigaade* "it is firmly fixed in place by law, by council."

Treaty with the Chippewa, 1855

Article 1, sentence 2. And he said Indians do further fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the Territory of Minnesota, or elsewhere.

1. "relinquish and convey to the United States"

The verb "relinquish something to someone" as used in this phrase was most probably translated by the same verb used to translate "cede." There are three choices, the most probable of which use the verb stems *bagidinamaw-* "allow someone something, let something go to someone" or *bagizikamaw-* "give up occupancy of something to someone." Neither term suggests permanent transfer or conveyance of exclusive rights. The verb "convey something to someone" may have been left untranslated, the sense being included in either verb noted above, or could have been translated with a form of the verb stem

zhooshkonamaw- "slide something to someone, smoothly transfer something to someone."

2. "right, title and interest"

In the English sentence, the object of the verbs, what was relinquished and conveyed, is the part of the sentence beginning with "any and all right, title and interest." The English terms "right, title and interest" which distinguish aspects of relationship to property, especially land, have no specific equivalents in Ojibwe. Any attempt to translate these terms literally would have been meaningless.

I find no equivalents for these nouns in Baraga's dictionary or in any later Ojibwe dictionary that I know of. My own Ojibwe word files, gathered from oral sources in twenty-five years of research and including over 25,000 words, contain no words translated with the nouns "right", "title", or "interest" The only noun that I find that could have been used by the interpreters here is a general abstract noun *dibenjigewin* which may be translated as "control, domination, ownership." This noun is derived from a verb stem *dibend-* 'control, dominate, master, own, possess something." The term *dibenjigewin* appears in a current Ojibwe legal glossary as the only translation for both "title" and "ownership" (Auger and Beardy 1993:95, 111). No equivalents for the English words "right" and "interest" are given in this legal glossary.

This lack of terms for specific relationships with property, especially land, is consonant with my understanding that individual land ownership was not a concern of the Ojibwe at this time, that the regulation of such did not form part of any legal system they had, and that

there was thus not a need for elaboration of vocabulary in this area.

While the interpreters could have made up specific words to translate "right, title, and interest", it is very unlikely that these words (of which there is no record either in written sources or in the contemporary language) would have been understood by the Ojibwes present. Innovations made on the spot to translate such culturally foreign concepts as "right", "title", and "interest" are likely to be misunderstood.

New words come into a language as a result of innovation by an individual or a particular group (as slang or jargon) or because of the introduction of a new object or idea into the culture. Any new word may spread into the common language or may just die out, but the acceptance of a new word and the full understanding of what it means, especially when a foreign concept is involved, may take considerable time.

There are three main ways in which words are innovated. The meaning of old words may expand to cover new meanings (with the old meaning sometimes then dying out); in this way, the meanings of words can be said to change. An example in Ojibwe is *odaabaan*, originally "sled, sledge" but by the early nineteenth century, extended in meaning to include the new item "carriage"; today it means "automobile." A language may also innovate by using its word building mechanisms to make up wholly new words out of existing word parts by combining roots, prefixes, and suffixes, or by making compounds out of existing words, in accord with the particular word formation rules of that language. Ojibwe

is rich in such word building elements and rules and most new words entering the language have been of this type. An example is *baashkizigan* "gun" formed by adding a noun-forming suffix to a verb *baashkizige* "burst things with heat or fire." The strategy of borrowing words from other languages, one that English has used extensively, has rarely been used in Ojibwe.

Few words indicating a need to have intertranslatability with English legal vocabulary seem to have entered Ojibwe by Bishop Baraga's time. There are a variety of terms for "law" and "make laws" but these are traditional terms relating to the activities of the indigenous legal and political system. I note terms for "judge" and "tribunal" in Baraga's dictionary (1853) but these seem to have more to do with the interest of the missionaries in translating scripture than in any need of Ojibwe society to have words naming features of the English legal system.

The last 150 years have seen little change in this area. The lack of intertranslatability between English legal terms and Chippewa words continues to be a major problem in the court systems of Manitoba and Ontario in which monolingual speakers of Ojibwe appearing in court require the services of interpreters. Even when these interpreters create new words to translate English legal terms and codify them in translation manuals and legal glossaries (Auger and Beardy 1993), a process that has been taking place only in the last ten years, this does not mean that their clients are familiar with the newly innovated words or understand what they mean when the interpreters use them. The interpreters may feel that they have new Ojibwe words to translate the English

words exactly, but the vast majority of speakers of the language, almost all of whom are not literate in the language, have had as yet no exposure to such innovations. It takes time for artificial innovations to be accepted as part of a language. Until then, such innovations are only proposed words, not actual words of the language carrying the meaning intended by their creators.

Thus, even if the interpreters at the treaties had what they felt to be accurate equivalents for such terms as "right", "title", and "interest", there is no guarantee that any of the Ojibwes present would have understood these new words. There is no record of any such innovations being accepted into the language.

Although the general notion of ownership may be translated as a noun *dibenjigewin* "ownership", it is unlikely on grammatical grounds to have been used here. The English sentence uses the prepositions "in" and "to" to express a relationship between the nouns "right, title and interest" to the noun "lands" in the phrase "in, and to any other lands." In English "ownership" would require the preposition "of." While "ownership" can be expressed by a noun in Ojibwe and "lands" is a noun, there is no way to express the relationship between them in Ojibwe except with a verb. The same would hold true for any innovated words for "right", "title", and "interest" in relation to the Ojibwe word for "lands." While Ojibwe has a grammatical device to relate two nouns, the first noun must name a being; abstractions are not eligible to participate in such a relationship. Ojibwe nouns also have a form parallel to the prepositions "in" and "to", a locative suffix on nouns, but it is not used to

express a relationship between two nouns, only between a verb and a noun. Nothing like "right, title and interest *in*, or *to* the lands" or "ownership *of* the lands" is allowed in Ojibwe.

The likely solution for the interpreter is to make the word *akiin* "lands" an object of the verb "relinquish", since this noun must be retained in order to specify which lands are involved. The abstract noun *dibenjigewin*, derived from a verb (or any innovated words for "right", "title", or "interest") doesn't fit into the Ojibwe sentence pattern required here. It would be possible to say the equivalent of "relinquish to someone ownership" but not "relinquish to someone the ownership of something." An abstract relationship, stated with a noun, to something concrete, can't be relinquished here, only the thing itself. The most likely translation for this phrase is something like "relinquish (and transfer) to the United States, the lands . . . " Modifiers equivalent to "completely" and "all" may have been used. A relative clause may follow the word for "lands" specifying which lands are involved.

I find that the sentence in question would have been translated in such a way as to suggest simply the ceding of the lands specified in the same way as lands were ceded in the Treaty of 1837; it would not have been understood to have included any difference in the nature or type of control released. It would not have been understood to affect the hunting, fishing, and gathering provisions of the 1837 treaty. If the hunting, fishing, and gathering of wild rice (or other ways of living off the land) were to be to be disallowed, there are any number of ways this could have been clearly stated, such as "The

Indians can no longer use the lands there to make a living from" or "The Indians can no longer hunt, fish or gather wild rice on the lands there." I find nothing in the Treaty Journal of 1855 that suggests any such language was used or interpreted.

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January 14, 1994, Affidavit Of Dr. Roderick H. Squires, Landowners' Expert Historical Geographer

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

MILLE LACS BAND OF CHIPPEWA INDIANS, ARTHUR GAHBOW, WALTER SUTTON, CARLEEN BENJAMIN, and JOSEPH DUNKLEY, ET AL, Plaintiffs, v. STATE OF MINNESOTA, ET AL Defendants.	Civil No. 4-90-605 Judge Diana Murphy Magistrate Judge Jonathan G. Lebedoff AFFIDAVIT OF RODERICK H. SQUIRES (Jan. 14, 1994)

STATE OF MINNESOTA)
) SS:
COUNTY OF HENNEPIN)

Roderick H. Squires, being first duly sworn upon oath, deposes and states as follows:

1. My name is Roderick H. Squires, Ph.D., and I am serving as an expert witness for the six intervening Landowners who are defendants in the above referenced lawsuit. I am making this Affidavit in response to certain portions of the plaintiffs' three summary judgment

motions which refer to the 1850 Executive Order of Zachary Taylor.

2. During the course of my involvement in this case, I have reviewed the Presidential Order, a true and correct copy which is attached hereto as exhibit A, as well as a number of other documents relevant to the privileges claimed by the Mille Lacs Band, and the removal of the Chippewa as well as other aspects of the 1850 Executive Order, which include, without limitation the following items:

a. Plaintiff's three summary judgment motion briefs and all supporting exhibits;

b. 1837 treaty and journal;

c. 1855 treaty and journal;

d. The *Voight* decisions issued by the Wisconsin Federal District Court, and Seventh Circuit Court of Appeals;

e. Works by Benjamin G. Armstrong, including: "Early Life Among the Indians", treaties of 1835, 1837, 1842, 1854 (Doc Numbers: MN 006304 – MN 006308), Benjamin Armstrong "Reminisces of Life Among the Chippewa (Parts I, II, III, IV) (MN 006312 – MN 006398);

f. The 1842 treaty, certain telegrams and communications regarding commissioner of Indian affairs and indian removal, (Doc Numbers: MN 3387 – 3390, 3391, 3393, 3394, 3396, 3398, 3399, MN 003400, 003401; and other items of special interest, including:

g. The December 1993 report entitled "The Regional Context of the Removal Order of 1850" prepared by Bruce W. White, in all of its 250 plus pages.

3. Throughout my review of the White report, although it cites to instances wherein the actual physical removal, or movement of, certain groups of Chippewa Indians including the Mille Lacs Band, may or may not have been completed in certain time frames or temporarily suspended; nowhere in Mr. White's report did I see any references to any historical or governmental documents which could question the effectiveness of that aspect of the 1850 Executive Order which revoked the privileges claimed by the plaintiffs in this lawsuit.

4. Based upon my 15 years of experience as an assistant and associate Professor of Geography at the University of Minnesota; my experience in historical and government documents research and analysis; and my particular experience in researching and analyzing historical and government documents as they impact land use and land management concerns and resource allocation issues, it is my opinion that the 1850 Executive Order had several aspects to it and that regardless as to what transpired concerning the physical removal or movement of one or more of the Mississippi Bands of Chippewa Indians including the Mille Lacs Band, none of these historical events as set forth by Mr. White, even if true and properly characterized by Mr. White (a topic not addressed by this Affidavit), have any relevance to, or effect upon the first part or aspect of the Order which clearly revoked the Mississippi Bands' of Chippewa, including plaintiffs', privileges of hunting, fishing, and gathering on the lands and waters within the boundaries

of the areas ceded by way of the 1837 treaty (the 1837 treaty of United States with the Chippewa, 7th Stat. 536).

5. It is my opinion that the revocation aspect of the 1850 Executive Order was never legally revoked, withdrawn, or invalidated.

FURTHER YOUR AFFIANT SAITH NOT.

/s/ Roderick H. Squires
Roderick H. Squires

Subscribed and sworn to before me
this 14 day of January, 1994.

/s/ Stephen G. Froehle
Notary Public

(SEAL) STEPHEN G. FROEHLE
NOTARY PUBLIC – MINNESOTA
RAMSEY COUNTY
My Commission Expires June 13, 1996

Report And Direct Testimony Of Dr. Helen H. Tanner For Plaintiffs (March 24, 1994) (Excerpts)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

MILLE LACS BAND OF CHIPPEWA INDIANS, ARTHUR GAHBOW, WALTER SUTTON, CARLEEN BENJAMIN, and JOSEPH DUNKLEY,	)	
Plaintiffs,	)	Civil No. 4-90-605
UNITED STATES OF AMERICA,	)	
Plaintiff-Intervenor,	)	
vs.	)	
STATE OF MINNESOTA, MINNESOTA DEPARTMENT OF NATURAL RESOURCES, and ROD SANDO, COMMISSIONER OF NATURAL RESOURCES,	)	
Defendants,	)	
COUNTY OF AITKEN, *et al.*,	)	
Defendant-Intervenors,	)	
JOHN W. THOMPSON, *et al.*,	)	
Defendant-Intervenors,	)	
and SAVE LAKE MILLE LACS ASSOCIATION,	)	
Amicus Curiae.	)	

REPORT AND DIRECT TESTIMONY OF DR. HELEN H. TANNER FOR PLAINTIFFS

* * *

of Minnesota, published with the support of the Minnesota Historical Society and leading citizens, including acknowledgements to Henry M. Rice, Henry H. Sibley, eminent historian the Reverend Edward D. Neil and other prominent residents. Alfred T. Andreas, the author, also published an excellent early history of Chicago. He secured much of his information from "old settlers," and interviews at the county seats.

The description of Mille Lacs County, organized in 1857, states that in 1873 the county had an estimated 1,472 residents who were chiefly engaged in timber export. Concerning the Mille Lacs Indians, numbering 773, the brief county description stated:

"The country is naturally fitted to suit their nomadic habits, as the lakes and streams abound with fish, and the dense woods with deer, bear and numerous fur-bearing animals."

The tension in the current situation was also recognized with the added comment:

"The rich pine forests have excited the cupidity of speculators and lumbermen, who urge the Government to remove the Indians to the White Earth Reservation." (Andreas, Preface, Map, and page 252)

Although the Mille Lacs Band of Ojibwe have experienced repeated encroachment, they have continued to live on their reservation to the present time.

V. Opinion: The Mille Lacs Indians did not understand or believe that the 1855 Treaty affected their rights to hunt, fish, and gather, etc. under Article Five of the 1837 treaty.

Since Article V of the 1837 Treaty was never mentioned in the planning, ojbectives, proceedings, or writing of the 1855 Treaty, the connection between the two documents is a topic lacking real substance. Because the question of a possible connection has been raised, it will be addressed with a series of clarifying statements.

First of all, the 1855 Treaty was a land sale treaty with the two-fold objective of acquiring valuable pinelands, and securing the remaining territory left unceded by previous Minnesota land cessions. The first sentence of the treaty describes the land cession, and the second sentence simply says they sold it all. Correspondence preliminary to the treaty emphasises the importance of acquiring the additional pinelands. By the 1850s, The lumbering frontier was close to the Mille Lacs settlements and the north line of the 1837 land cession.

The proceedings of the 1855 treaty indicate that both Hole-in-the-Day and Flat Mouth, leaders of the two principal delegations, stated that they were engaged in land sale deliberation. They looked at the map brought foreward displaying lands already ceded and those not yet ceded, but their real concern was what they would receive in return. Comments of the Commissioner, the Indian delegates, and Henry Rice dealt with the estimated number of acres involved in the prospective session, as well as the price per acre.

Secondly, the discussion of debts to traders during the latter part of the treaty proceedings indicates the mutual understanding that hunting and trading were a continuing part of the lifestyle of these Indian people. Commissioner Manypenny strongly advised trade on a cash rather than a credit basis. He also tried to impress upon the delegates the value of farm life, a policy that missionaries and reform-minded officials had been ineffectively urging on Great Lakes Indians since the "civilization fund" was established in 1819. Only Hole-in-the-Day showed interest in adopting the "White man's" life style; he did not represent the Mille Lacs Ojibwe nor their manner of living.

The Mille Lacs Indians sought and received government support to insure their continued use of their special resource, the rice beds. The government recognized that lumbermen were obligated to pay the Mille Lacs Indians for damages to their rice crop as a result of dam building. The "gathering" activities of the Mille Lacs Indians were an important part of the regional economy, since they sold both rice and maple sugar, chiefly to the lumber crews. (They also sold moccasins made from tanned deerskins.)

Thirdly, the Indians' understanding of their rights to continue traditional pursuits was shared by non-Indians in Minnesota. The acceptance of the Indian way of life is still evident in the statement from the Mille Lacs county history published in 1874. At the time of the 1855 Treaty, the Indian lifestyle was economically important to non-Indians, particularly in the district north of St. Paul and Minneapolis. The traders who dealt with Indian hunters formed a powerful element in territorial politics. These

men exerted a recognized influence in Indian treaty-making. Since political leaders had a financial interest in Indian traditional economic pursuits, they would be inclined to preserve, not impair, Indian rights under the 1837 treaty if the subject had ever been raised in connection with the formulation of the Treaty of February 22, 1855.

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Report And Direct Testimony Of Dr. Bruce M. White For Plaintiffs (March 1994) (Excerpts)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

MILLE LACS BAND OF CHIPPEWA INDIANS, ARTHUR GAHBOW, WALTER SUTTON, CARLEEN BENJAMIN, and JOSEPH DUNKLEY,	)	
Plaintiffs,	)	
UNITED STATES OF AMERICA,	)	
Plaintiff-Intervenor,	)	Civil No. 4-90-605
vs.	)	
STATE OF MINNESOTA, MINNESOTA DEPARTMENT OF NATURAL RESOURCES, and ROD SANDO, COMMISSIONER OF NATURAL RESOURCES,	)	
Defendants,	)	
COUNTY OF AITKEN, *et al.*,	)	
Defendant-Intervenors,	)	
JOHN W. THOMPSON, *et al.*,	)	
Defendant-Intervenors,	)	
and SAVE LAKE MILLE LACS ASSOCIATION,	)	
Amicus Curiae.	)	

REPORT AND DIRECT TESTIMONY OF DR. BRUCE M. WHITE FOR PLAINTIFFS

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The Regional Context of the Removal Order of 1850

By Bruce M. White

A Report Prepared for the Mille Lacs Band of Ojibwe

December 1993

Technical corrections made March 1994

/s/ Bruce M. White

• • •

Table I:
White Settlement Rate in Minnesota Portion of the 1837 Treaty Area

	1837 Treaty Area	Whites per sq. mile	Growth Rate	Minnesota	Growth Rate
1846	286	.03			
1847	434	.05	51%		
1850	892	.09	106%	6,038	
1857	5,984	.63	570%	150,037	2385%
1860	6,644	.70	11%	169,395	13%
1870	18,136	1.9	172%	438,257	158%
1880	40,181	4.26	122%	780,883	78%

Notes to Table I

"Growth Rate" is defined as the rate of increase in the population of the area and of the state as a whole from census to census.

1846: The area includes districts 2 & 3 of St. Croix County, Wisconsin Territory, including the region of Marine and north (Wisconsin Territory 1846).

1847: The area includes District 1 of St. Croix County, Wisconsin Territory, including the region north of Stillwater (Wisconsin Territory 1847).

1850: The area includes Benton County and those portions of Ramsey and Washington counties outside of Stillwater and St. Paul (Harpole and Nagle 1972).

1857: The area includes Anoka, Benton, Buchanan, Carlton, Chisago, Crow Wing, Isanti, Morrison, Pine, and Sherburne counties (Minnesota Territory 1857).

1860: The area includes Aitkin, Anoka, Benton, Buchanan, Carlton, Chisago, Crow Wing, Isanti, Kanabec, Mille Lacs, Morrison, Pine, and Sherburne counties (U.S. Department of Interior. Census Office 1883).

1870 and 1880: The area includes Aitkin, Anoka, Benton, Carlton, Chisago, Crow Wing, Isanti, Kanabec, Mille Lacs, Morrison, Pine and Sherburne counties (U.S. Dept. of Interior. Census Office 1883).

* * *

News, however, reached St. Paul. On July 19, 1849, the *Minnesota Chronicle* reported that there was news of an outbreak among the Winnebago and "that they are committing outrages upon all the whites within their reach." On July 23 Ramsey had a council with the Winnebago chiefs. On July 25 he noted that at another council he rebuked one of the chiefs for announcing that there would be trouble if the Agent J.E. Fletcher were not removed (AR M203, R. 38, V. 18). The annuity payment began that afternoon, concluding the next day. Ramsey left Long Prairie and reached home on July 30.

Meanwhile, the *Minnesota Register* on July 28 stated that St. Paul was full of rumors of outbreaks by the Winnebagos:

> The only authentic information we can gather is, that Governor Ramsey, having learned that the Winnebagos planned a general departure to their old homes in Wisconsin so soon as the payment was made, delayed the payment and sent a message to Captain Todd, at Fort Gaines, for troops to restrain them.

This account of actions said to have been taken by Ramsey, regarding the Winnebago is corroborated in Ramsey's own correspondence. On July 23 he wrote to Captain J. B. S. Todd, in command at Fort Gaines (Fort Ripley). He stated that there would be an annuity payment the next day and that he had a "serious apprehension that many of the Indians will leave the country & return south" (NAM M842, R. 8). Ramsey instructed Todd to take a large force and station them at the mouth of the Watab on the east side of the river to head off any of the Winnebago who appeared there. He also instructed Todd to seize and hand over to proper authorities all persons violating laws regulating trade and intercourse with the Indians. Todd's force at the mouth of the Watab would be required for three weeks at the discretion of the agent for the Winnebago and Mississippi Ojibwe, J.E. Fletcher. The officer in charge of the force at the Watab was a Captain Monroe.

On his return to St. Paul, Ramsey, on August 6, 1849, wrote to A. M. Mitchell the U.S. marshal to proceed to Sauk Rapids and give Monroe

> such assistance as he may be entitled from the civil arm of the government in protecting the peace of the frontier from Indian incursions and in preventing as much as you and he can a violation of the several acts of Congress regulating trade and intercourse with the Indians.

It was commonly believed by government officials in early Minnesota territory that any problems they had with the Indians in the area of the Mississippi south of Crow Wing was exacerbated by the presence of traders who supplied the Indians in the area with whiskey. While laws governed the Indian trade in Indian lands, preventing trade by unlicensed traders, the area east of the Mississippi was not technically Indian land any more, though Indians were entitled to live there. Hence the trade and intercourse laws could not be enforced. Commissioner of Indian Affairs William Medill in early 1849 appears to have recognized the problem. Writing to J.E. Fletcher on April 24, 1849, Medill (NAM M842, R. 1:8) stated that it was a matter of doubt if the trade and intercourse laws actually applied to the area ceded by the Ojibwe Treaty of 1837. However,

> as a matter of policy and with reference to the welfare of the Indians, it may be advisable to hold out the idea that they are enforced there. The question could probably only be properly tested by a suit. No proper effort should be spared to prevent the introduction of liquor into it.

The success of Ramsey's attempt to enforce the trade and intercourse laws in the 1837 treaty area is unclear. The following year in a letter to Commissioner of Indian Affairs Orlando Brown (NAM M842, R. 8, April 16, 1850),

Ramsey had further thoughts on the problem, particularly as it related to the region between Sauk Rapids and Crow Wing:

> In that part of Minnesota, on the west [east?] bank of the Mississippi from Sauk Rapids up to Crow Wing, there is now and has been ever since the removal of the Winnebagoes to this territory a great number of whiskey dealers. They are all along the river, and bear so large a proportion to the population that it is difficult to enforce a law against them.

The problem was that the land was unsurveyed. It was the property of the U.S. government and it would be several years before land could be "subject to private entry." Whites who were there were technically trespassers. Ramsey suggested that Congress should enact a law stating that the trade and intercourse laws should have the same force and binding obligation there as in Indian country. At the same time Congress should allow private entry on public lands. This would allow legal settlement more rapidly, helping to create "a healthful public opinion averse to Indian whiskey trade."

These solutions to the problem apparently only occurred to him later. Although all the evidence indicates that the Winnebago were the main problem, Ramsey made no efforts to remove them from Minnesota Territory. Instead he attempted to remove the Wisconsin Ojibwe into Minnesota. The vehicle for pressuring the federal government to take action was the Territorial Assembly elected in the summer of 1849.

On July 7, Ramsey issued a proclamation dividing the territory into legislative districts and ordering an

election on August 1 to choose 9 members of a Council and 18 members of a House. The election would also choose a delegate for the U.S. House of Representatives (Folwell 1956, 1:252-53). Sibley was elected delegate. The new legislative assembly convened on September 3 in rooms at the Central House hotel in St. Paul (Folwell 1956, 1:253).

Speaking to the assembly on the second day of their session, Ramsey spelled out what he thought should be its agenda. In the speech Ramsey made mention of the area of Minnesota that he had visited earlier in the summer and spoke of his concern for the Indians in the area. Instead of the Winnebago, who had been his major concern and that of the St. Paul newspapers earlier in the summer, Ramsey's interest now was in the Ojibwe:

> Much complaint is made by the settlers about Sauk Rapids, Swan River &c as to the demoralizing effects of the privilege given the Chippeways, in the Treaty of 1837, to hunt and fish upon the lands ceded by said Treaty. It might be well for the Legislative Assembly, to memorialize the President of the United States, requesting him to notify the Chippeways that these privileges must cease and requiring them to move into their proper territory (AR M204, R. 2, V. 2, p. 10)

In a rough draft of the speech Ramsey's words were slightly different:

> Much complaint is made by the settlers about Sauk Rapids, Swan River &c of the demoralizing effects of the privilege given the Chippeways in the Treaty of 1837 to hunt & fish upon the lands ceded by said Treaty. It might be well for the Legislative assembly to memorialize the President of the United States asking him to notify the Chippeways that the privilege [crossed out: to hunt & fish upn. The terrty. ceded between the Watab & Crow Wing on the East side of the Mississippi must cease] must cease & requiring them to move to their proper territory (AR M203, R.4).

Given the amount of time that he had spent in dealing with the Winnebago, it is surprising that Ramsey would now speak of complaints regarding the Ojibwe. However, the linkage that Ramsey made between alleged complaints about the Ojibwe and their possible removal was a common one among those who were calling for removal at this time, whether government officials or ordinary citizens. Asking for the removal of the Ojibwe was very much in the air at the time. And, so-called "depredations" by the Ojibwe was a theme which ran through much of the writing calling for removal.

Such a linkage was an implicit recognition that demonstrating that the Ojibwe were harassing whites or their property was necessary in order to justify such a removal. Apparently the belief that the 1837 treaty had allowed the Ojibwe to remain on the ceded land if they behaved was commonly held by whites who had contact with Indians. A. L. Larpenteur (1901, 9:384), a merchant and trader in early St. Paul, repeated this impression many years later in a reminiscence of early days in Minnesota:

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Page 6 Of The March 30, 1994,
Deposition Of Herman Kegg

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

March 30, 1994

Mille Lacs Band of Chippewa Indians, et al.,

HERMAN KEGG

State of Minnesota, et al.,

I

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* * *

[6] A I don't remember that. She's about 92 now, so . . .

Q Is she a Leech Lake Band Member?

A Yeah, uh-huh.

Q And where was your father born?

A I think he was born at Mille Lacs Lake; I don't remember.

Q Milaca?

A He's been a Mille Lacs laker all his life. He was one of them nonremovable Bands.

Q By "nonremovable," what do you mean?

A They used to move them around to different places, but the Mille Lacs Band, they couldn't move him.

Q To your knowledge, were any Mille Lacs Band Members ever removed?

A Some. White Earth, part of north; I heard those from my dad. He used to tell me.

Q And you have lived in the Mille Lacs Lake area all you life?

A Yes.

Q What did your father do?

A He used to log.

Q Do you recall who he logged for?

A I don't remember. But the time he logged, I guess there were pine trees all over; they're all gone now.

Q Did he ever do anything else besides log?

A Well, later on when he quit I think he worked for the

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Pages 45, 78-79 Of The March 31, 1994, Deposition Of Brenda Boyd

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

March 31, 1994 — *Mille Lacs Band of Chippewa Indians, et al.*

BRENDA BOYD

I — *State of Minnesota.*

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* * *

[45] A. No.

Q. In terms of your understanding of oral traditions and your personal knowledge based upon somebody passing down the oral traditions to you, what is involved regarding the 1837 Treaty? Or was there any?

A. Not that I know of.

Q. Same would go with the 1855 Treaty?

A. Yes.

Q. What about the 1863 Treaty? You mentioned you had a document apparently in your family that goes back to that?

A. Yes.

Q. Would that be included in the oral tradition?

A. The oral tradition of the Band?

Q. Right – No. Of your understanding of it, your oral tradition?

A. Could you rephrase the question again?

Q. You had said that your family has a document that is involved with the 1863 Treaty; I think you said it might have been a House Hearing or Congressional Hearing. Based upon that or something else, is the 1863 Treaty included in the oral traditions of the Band in your understanding?

A. I don't know.

MR. CHAFFEE: Off the record.

(Discussion held off the record.)

MR. CHAFFEE: Back on the record. Ms. Boyd, I'm

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* * *

[78] "Ojibwe oratory," and do you understand it to be something different than an oral history or oral tradition?

A. Ojibwe oratory?

Q. Oratory; right? For example, the speeches of particular leaders or Chiefs of the Band given on the occasion of particular events? Are you familiar with that term being used?

A. No.

Q. There is a paragraph from "Against the Tide of American History" that talks about the 1855 Treaty, and it says – I'll read you a couple sentences. "The Treaty of 1855 was, like most other treaties, made at this time to

keep peace and friendship. It helped the American Government encourage the Chippewa to give up their hunting, fishing, and gathering way of life for farming and other pursuits of their white neighbors." Do you have a view as a historian whether or not you agree with that statement: that one of the purposes of the 1855 Treaty was to encourage giving up hunting and fishing and gathering in the pursuit of the agricultural way of life of their white neighbors?

A. Wasn't the 1855 the one that set up the boundaries of the Mille Lacs Reservation?

Q. Yes, it did.

A. And there were other provisions in there, also?

Q. Yes. There were provisions in there for services of [79] farmers, teachers. There were annuity payments, and other things like that.

A. Were there also educational services that were supposed to be allowed in that one or was it in a previous?

Q. I guess I'm not sure. I can't tell you on the educational issues. Do you have my original question in mind?

A. No.

Q. Let me read it again.

A. I'm sorry; I had to find out what –

Q. Sure. The book says, "The Treaty of 1855 was, like most other treaties, made at this time to help – made at this time to keep peace and friendship. It helped the

American Government encourage the Chippewa to give up their hunting, fishing, and gathering way of life for farming and other pursuits of their white neighbors." Do you, as a historian, agree with that statement relative to the 1855 Treaty or do you have an opinion on it?

A. I agree with the general statements. There was other purposes for the treaties, too, that were not mentioned there.

Q. Sure. One being establishing a reservation?

A. Right.

Q. Your father, Alex Moose, was he considered a respected elder in the Mille Lacs Band?

A. I would hope so.

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